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ORIGINS
OF THE EARLY ENGLISH
MARITIME AND COMMERCIAL LAW

ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW

BY

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ὁ δὲ νόμος τῆς θαλάσσης τῷ νόμῳ κρινέσθω τῷ ναυτικῷ

THE CENTURY CO.
NEW YORK LONDON

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CARNEGIE CORPORATION OF NEW YORK

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PRINTED IN U. S. A.

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ET
CONIVGIS AMORI

FOREWORD

BY

SIR WILLIAM S. HOLDSWORTH, K.C., D.C.L., F.B.A.
Vinerian Professor of English Law in the University of Oxford

Dr. Sanborn's book on the origins and mediæval development of maritime and commercial law in England is a very welcome addition to the all too scanty historical literature of two of the most important branches of Anglo-American law. As compared with continental countries, English books upon the many aspects of the history of these branches of law are rare. The chief reason for this is to be found in the fact that the intellectual equipment required for their successful historical treatment is far more cosmopolitan than that possessed by most English lawyers. Dr. Sanborn's book will go a long way towards filling this gap in our legal and historical literature, because the author is a master not only of the English but also of the continental authorities; and not only of the continental authorities, but also of the Greek and Roman authorities, from which the modern law both of England and the continent are directly or indirectly derived.

These two branches of law comprise the mediæval Law Merchant. That they are intimately related is indicated by their comprehension under this general title; and their intimate relation has been apparent throughout the ages. It was recognised by Gerard de Malynes, the writer of the earliest English treatise on this subject. "Even as the roundness of the globe of the world is composed of the earth and waters; so the body of the *Lex Mercatoria* is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth." Malynes also recognised another fact of much greater importance, which has been equally apparent throughout the ages—the great uniformity characterizing this Law Merchant, which causes its rules to transcend national boundaries, and gives to them an international, or perhaps we should rather say, a cosmopolitan character. "The customary law of merchants hath a peculiar prerogative above all other customs, for that the same is observed in all places."

This uniformity in the rules of the Law Merchant was as apparent in the law of Greece and Rome as it was in the law of mediæval societies; and it was probably equally apparent in the still earlier civilizations which existed before Greece or Rome. As Dr. Sanborn truly says, "should our knowledge of the law in the centuries which stretch backward from Greece and Carthage to Crete, Cyprus, Phœnicia, Egypt, and Assyria become some day more ample, we should expect to find that the unity of the maritime law was even more ancient than we can now prove it to be." It is even more apparent today than it was at any earlier period in the history of the Law Merchant. Today the discoveries of science have immensely increased the volume of trade, altered the conditions of transport, and diminished its risks. These changes tend to accentuate uniformity because they tend to the elimination of local peculiarities. An age of machines is an age of mass production and of standardization. But, since the discoveries of science have not altered the nature of the human agents who work the machines, we find that the same disputes and the same problems emerge now as emerged in Greece, at Rome, in the commercial centres of mediæval Europe, and probably in the commercial centres of still older states. And so the principles which the commercial centres of mediæval Europe inherited from Greek and Roman civilization, and developed to meet their own needs, are at the root of the codes of maritime and commercial law which govern trade today.

Many rules of Greek maritime and commercial law, rules which may have owed something to still older civilizations, found a place in the law of imperial Rome. Upon the perfecting of that law the keenest intellects of the time had been employed for centuries, and the results were summed up in Justinian's codification. Thus in the law of the Roman empire there was gathered up the contribution made by Rome and by the older civilizations which Rome had absorbed; and all these contributions were passed on to the new nations which arose on the ruins of the Empire. The law of the Empire was destined to have a much longer life than the Empire itself. The fact that the new nations, which arose out of its ruins, had this great body of law on which they could draw, was a fact of decisive importance in their history because this law which they inherited contained ideas and principles of a relatively advanced civilization. They were able to make a far more rapid progress than would otherwise have been possible, because they drew upon this great body of principles, and gradually assimilated them with more and more intelligence, as the degree of their civilization approached that of the ancient world.

This debt of the modern to the ancient world is apparent in many spheres of legal and political thought. But it is perhaps more directly apparent in the spheres of maritime and commercial law than in any other sphere. One reason for this is to be found in that similarity of the problems arising out of sea-borne trade which, as we have seen, makes for uniformity in these branches of the law. But the chief reason is a fact of political history which Dr. Sanborn has I think, for the first time clearly brought out. From the beginning of the fifth century A. D. the centre of the Roman Empire had been Constantinople, and it was at Constantinople that the Roman law had been codified by Justinian. But, long after the time of Justinian, the relations between Italy and Constantinople had been close. Roman influence had been reëstablished in Italy in the reign of Justinian, and that influence, as Dr. Sanborn points out, "was destined to last for another five centuries and to tide the Italian ports over the darkest days of the world's disorganization." Thus there was a direct connection between the Italian cities on the one hand, and the *Corpus Juris* of Justinian and the later developments of the *Corpus Juris* contained in the *Basilica* on the other. Through their connection with the Eastern Empire the Italian cities directly inherited the maritime and the commercial law of the ancient world, and passed it on to western Europe. When, in the twelfth century, the study of the Roman civil law revived, and when, from that century onwards, the canon law became a definite system, both systems were regarded by mediæval lawyers and statesmen and thinkers as universal systems, which could and should be drawn upon by the nascent nations of western Europe. Thus the law which the Italian cities had directly inherited from the Eastern Empire was accepted as authoritative. This strengthened the tendency to uniformity, which the similarity of the problems which they must solve had always imposed on the rules of maritime and commercial law; it made men think of the Roman rules on this topic as a *jus gentium;* and it therefore facilitated their adoption by the trading centres of western Europe.

From Italy these rules spread to the cities of southern France, to the great fairs—especially the fairs of Champagne, to the cities of the Netherlands, to the cities of Germany. But in the process of their diffusion throughout Europe they were both modified and developed. Just as the custom of the merchants had been originally the basis of the Roman rules codified in the Digest, so the custom of the merchants all over Europe was developing the law. We see that process at work in the Scandinavian countries where the influence of Roman law was small, in the laws of Oleron, on which the English maritime law was based, and in the Italian cities and other commercial centres of Europe. This effect of mercantile custom upon the development of the law was facilitated by two sets of facts. In the first place, it was facilitated by the growth of courts staffed by merchants. In the second place, it was facilitated by the growth of a swift procedure in these courts which set itself to eliminate legal technicalities, and to decide cases equitably—a growth helped forward by Clement V's bull *Sæpe Contingit,* which, in 1306, defined the meaning of the direction often given to the judges of these courts, that they should proceed *"simpliciter ac de plano ac sine strepitu et figura judicii."* Thus full play was given to the creative force of mercantile custom. But custom applied by tribunals staffed, not by professional lawyers, but by merchants, will not produce a settled body of legal principles, unless in the background there is a body of technical rules and principles, which will impart a stiffening of logic and system to the customary rules and practices. This stiffening of logic and system was supplied by the trained civilians and canonists. They gave a technical form to the customs of the mariners and merchants; and thus, while the creative power of custom to develop the law was preserved, those developments were made part of a system, which the countries of western Europe received as and when the development of their trade became sufficiently advanced to receive them.

This partnership between the merchants and the lawyers, which gave due weight both to custom and to the technical development of legal principle, laid the foundation of our modern maritime and commercial codes. The technical development was in the hands of the civilians and the canonists; and the efforts of the schools of the glossators and the commentators resulted in the creation of these codes on the basis of the technical concepts of the civil and canon law. How far other elements contributed is not yet definitely settled. Some writers have maintained that an Arabic influence can be discerned in the evolution of the law as to negotiable paper. Probably the influence of such elements is inconsiderable. No doubt parallels can be established. But to establish a parallel is one thing: to establish derivation is another. It seems to me that these parallels establish merely the similarity of the legal devices which lawyers used to meet similar needs at different times and places. They illustrate the great and permanent reason for the uniformity of the rules of maritime and commercial law throughout the ages. However that may be, it is certain that it was through the technical concepts of the mediæval civilians and canonists that the law, as we know it, was worked up into the system which governs us today.

These were the main elements which governed the development of the maritime and commercial law of the commercial centres of mediæval Europe. But their influence was felt mainly in those centres. Many parts of western Europe, including England, were commercially backward. The small transactions of their domestic trade were governed by their local customary rules. In the records of the English fairs, and in the courts of the English boroughs, we hear only faint echoes of those cosmopolitan rules of maritime and commercial law, which were being developed in the large cities and seaports of Italy, of the south of France, of the Netherlands, of Germany, and in the fairs of Champagne. The reason why there was no reception of these cosmopolitan rules in England in the Middle Ages is partly the fact that England lay off the main commercial routes, but chiefly the fact that the larger transactions of foreign trade were in foreign hands. The fact that foreign merchants were well enough known in England, and that they were encouraged, is shown by the forty-first chapter of the Great Charter of 1215. But these foreign merchants had their own organization which settled their own disputes; and royal privileges put them outside the common law. One of the most interesting features of Dr. Sanborn's book is his account of the extent of the trade of these foreign merchants, and of their organization. It is essential to get a clear understanding of these matters in order to understand the main reason for the backward state of maritime and commercial law in England in the twelfth and thirteenth centuries.

In the course of the fourteenth century the trade of England developed; and fiscal needs induced the king both to continue to encourage the associations of foreign merchants, and to provide, by the Statute of the Staple, a court in which the Law Merchant was administered to natives and foreigners alike. On the other hand, the English merchants had always been jealous of the privileges granted to the foreign merchants; and their jealousy increased as

Englishmen began to take a share in foreign trade, and England began to manufacture some of her own products. The struggle between the English and the foreign merchants in the latter part of the mediæval period—a struggle complicated by considerations of foreign policy, by dynastic struggles, and by constitutional conflicts between the king and his Parliaments—has been narrated with great skill by Dr. Sanborn in the closing chapter of his book. It is a pioneer piece of work in English, for never before have the details of this complex struggle been so fully and clearly narrated from the point of view of its bearing upon the development of maritime and commercial law. Dr. Sanborn has shown that there were ebbs and flows in this struggle—now foreign, now English influences prevailed. But on the whole, it went in favour of the English. At the close of the mediæval period England was taking into her own hands the management of her foreign trade; Englishmen trading abroad got from foreign princes privileges similar to those which foreigners had enjoyed in England; and the operations of the company of the Merchant Adventurers and the company of the Staplers showed that Englishmen were becoming familiar with the operations of foreign trade. In 1497 John Cabot set sail from Bristol and discovered Newfoundland. The discovery of new worlds in the last years of the Middle Ages and in the sixteenth century made commerce world-wide, and put England on the main trade routes of the world. The stage was thus set for the reception by English merchants of those foreign doctrines of maritime and commercial law, which had been evolved in the trading centres of Europe during the Middle Ages, on the joint bases of mercantile custom and the canon and civil law. The strong government of the Tudors, and the consequent growth of an intense nationalism, made that reception inevitable.

Dr. Sanborn's book closes at the end of the mediæval period. Its skilful analysis of the causes which made this reception of foreign maritime and commercial law inevitable in the following period enables us to see why we must look to that period for the beginnings of our modern maritime and commercial law. I hope that in a future volume Dr. Sanborn will tell the tale of the manner in which that reception was effected, and of the manner in which it added large new chapters to the mediæval common law. It is the tale of a unique and an insular development, because the political condition of England at the close of the Middle Ages, and its common law, were unique and insular. They continued to be unique during the sixteenth century because the Tudor kings, unlike their continental brethren. did not find it necessary to sweep away mediæval institutions and the mediæval law; and they became even more unique and insular as the result of the constitutional controversies of the seventeenth century, in which the mediæval institutions and the mediæval law, which England had retained, played a decisive part. It was possible to retain these mediæval institutions and this mediæval law in the sixteenth century, it was possible for them to play this great part in the seventeenth century, because they had been rationalized by the centralized government of the strong kings of the twelfth and thirteenth centuries, and could therefore be used by the Tudors when they set about their task of reëstablishing order and of modernizing the English state. They were used by the Tudors, but to them were added other institutions needed to administer the new bodies of law which this process of modernization demanded. The new maritime and commercial law was administered in a revived and strengthened court of Admiralty, assisted by the Council, the Star Chamber, the court of Chancery, and the court of Requests. But, even at the close of the Middle Ages, the common law had shown signs of wishing to obtain jurisdiction over some of the commercial business which was beginning to come to the courts; and, at the end of the sixteenth century, it was beginning to make a bid for supremacy over those rival courts which had sprung up during that century. The influence of Coke, and the result of the constitutional conflicts of the seventeenth century, won for the common law jurisdiction over the commercial and large parts of the maritime law of England. Henceforward they were to be administered, not as in continental states as separate parts of the law of the state, but as a part of the common law. At the end of the seventeenth and at the beginning of the eighteenth centuries Chief Justice Holt began the process of introducing into, and assimilating with, the principles of the common law, those doctrines of the continental maritime and commercial law, which the acquisition of these new fields of jurisdiction rendered necessary; and, in the last half of the eighteenth century, the reception was completed by Lord Mansfield. A little later Lord Stowell—the greatest of English Admiralty judges—settled the prize law of England, and the branches of maritime law over which the court of Admiralty still retained jurisdiction.

This in very bare outline is the tale of the later development of maritime and commercial law in England. It is a tale which has never yet been completely told, and it urgently needs a competent historian. Dr. Sanborn's book shows that he is well fitted to be its historian. I hope that he will resume his work; and, having guided us through the difficult period of mediæval origins, he will write the history of the development of the modern law.

I would end this Foreword on a personal note. This book, originating in a Ph. D. thesis in Oxford University, is a credit both to the University and to St. John's College of which Dr. Sanborn is a member. I am sure that if Dr. Sanborn's Elizabethan ancestor, who was a member of St. John's College in its early days, could revisit his old college and hear of the doings of its members, he would be as proud of the achievement of his descendant as I am of the achievement of my late pupil.

W. S. HOLDWORTH.

ALL SOULS COLLEGE,
September, 1930.

AUTHOR'S PREFACE

There is not any history in English of the maritime law, nor has any such history been published in any language since Desjardins completed his general work almost two generations ago. Neither is there to be found any history in any language of the English maritime law, except for occasional articles and chapters forming parts of works having a wider scope.

In the cognate and, at this period, parallel field of the commercial law there is also not to be found any history in English. The histories written in other languages either ignore or else deal inadequately with the development of that branch of the law in England.

It is believed, therefore, that this work fills an hitherto existing void in the literature of legal history, and it was with this in mind that the book was originally commenced at Oxford University under the supervision of Sir William Holdsworth, who has done the author the great honor of writing the foreword.

The author believes that in this work he has not only proved the unbroken continuity of the development of the maritime law, a point hitherto not proven by any writer, but also the very close interconnection existing between the maritime and the commercial law during the mediæval period. For this reason the development of the maritime law and of the commercial law has been traced in parallel pairs of chapters. History is indeed a seamless web, and it has seemed to be impossible to give any satisfactory account of these branches of the law in England without explaining the development of their continental European prototypes, at once the root and the pattern of the English growth.

The commencement of the XVI Century was chosen as the terminus of the work for many reasons, some of which are set forth at length in the opening paragraphs of chapters IV and V. Another important reason is that the early maritime cases which Mr. Marsden has edited for the Selden Society and for the Navy Records Society commence where this work ends, while the early law reports commence where Mr. Marsden ends, so that for the period not covered by this work the principal material is printed in readily available books. Similarly the common law courts began to adopt the commercial law in the XVI

Century, and as soon as we enter the time of the law reports it is fairly plain sailing. These similar considerations, which exist in both branches of the law, made the author's choice of his terminus almost inevitable.

The words "maritime law," as commonly used today, denote that part of the whole law which deals chiefly with the legal relations arising from the use of ships. But in the earlier period, of which this work treats, the law maritime had a considerably wider scope. It dealt not merely with the modern Admiralty law, but also with the primitive ancestors of some branches of our modern commercial law, dealt, too, with the germs of that public law which we today style international law.

In a larger sense the early maritime law might well have been called the private (and to some extent the public) international [1] law of its day, a law perhaps not international, but super national, a visible proof of the substantial unity of the great *res publica Christiana.* This feature seems the more striking to us today, but it would probably not have seemed to be at all unusual to the mediæval student.[2]

Nor, in a still earlier day, would the unity of action and the unity of thought, which made uniform the mediæval customs on which the mediæval laws were based, have been thought any more remarkable.

It has been justly observed that the Roman lawyer could not have had the conception of International Law with which we are familiar today, for we predicate a number of sovereign political entities more or less equal in physical powers, whereas the Roman Empire comprehended in one unit the entire known civilized world, with only semi-barbarous tribes for neighbours. Sir Henry Maine has pointed out that the Roman concept of *Jus Gentium* conveyed to a Roman ideas quite different from those conveyed to, let us say, Grotius.[3] "Whenever a particular usage was seen to be practised by a large number of separate races in common, it was set down as part of the Law *common to all* [my italics] Nations, or Jus Gentium.[4] . . . The Jus Gentium was accordingly a collection of rules and principles, determined by observation to be common to the institutions which prevailed among the various Italian tribes." [5]

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[1] Goldschmidt, p. 33. Mitchell, p. 1. Pollock and Maitland, I, p. 467. Most of the writers who treat of the subject lay stress on its international character and its universality.

[2] Holdsworth, *H. E. L.,* V, p. 61.

[3] Maine, *Ancient Law,* p. 53.

[4] Goldschmidt, p. 75.

[5] It will be noticed how different this is from the later usage of *Jus Gentium* to mean the Law *of* Nations, a law existing among, and governing the relations

It is in this sense of "law common to all nations" that the author would like to consider his subject, and it was while this condition existed that early England first gave its adherence to this wider common law. Perhaps, as has been well suggested,[6] the best adjective to apply to it is "cosmopolitan."

Another point to be noticed concerns the manner of the development of the law. That the law has maintained so much unity over long periods of time, and over so much of the civilized world is due to the "necessary and permanent conditions of trade." [7] These conditions have demanded various regulations, some of them fairly permanent, and some of them changing from time to time. It has not been difficult to make these changes because, for the greater part of the period which we shall consider, the people who lived under the law have generally had the power to make and to alter it, sometimes by enactment, but chiefly by custom or by the compilation of customs. The importance of the customary origin of the law, taken in connection with its cosmopolitan character, can scarcely be overrated. More will be said hereafter of the importance of custom, but it is interesting to note here that it can be seen at work as early as 540 A. D., when the Eastern prefect, by the order of Justinian, assembled the captains who were concerned in maritime loans in order to ascertain from them what were then the current customs.[8]

In conclusion the author wishes to acknowledge his great debt to the assistance, the generous advice and the encyclopedic knowledge of Sir William Holdsworth, Vinerian Professor of English Law in the University of Oxford, to whose inspiration this work is due.

The author must also gratefully thank Professor Edward P. Cheyney of the University of Pennsylvania, Chairman of the Committee for Publication of The American Historical Association, and the other members of his committee, for their consideration and acceptance of his book, and for kindly criticism which has been of material assistance in its revision for publication under the auspices of The American Historical Association.

165 Broadway, New York City.
January 29, 1930.

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among separate, independent and sovereign political entities. Maine, *Ancient Law*, p. 55. "It is almost unnecessary to add that the confusion between Jus Gentium, or law common to all nations, and *international law* is entirely modern."

[6] Goldschmidt, p. 16, "Der kosmopolitischen Natur des Handels"; also see p. 130. Holdsworth, *H. E. L.*, V, p. 60, "I should prefer to call it their cosmopolitan character."

[7] Holdsworth, *H. E. L.*, V, p. 62.

[8] Ashburner, p. ccxix.

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CONTENTS

PAGE
FOREWORD BY SIR WILLIAM S. HOLDSWORTH vii
AUTHOR'S PREFACE xv
LIST OF AUTHORITIES AND SOURCES xix
CHAPTER
I CLASSICAL INFLUENCE: A SURVEY OF MARITIME LAW TO THE ELEVENTH CENTURY 3
II EUROPEAN MEDIÆVAL MARITIME LAW: 1063 TO 1500 A. D. 42
III EUROPEAN MEDIÆVAL COMMERCIAL LAW 125
IV EARLY ENGLISH MARITIME LAW 262
V EARLY ENGLISH COMMERCIAL LAW 324
APPENDIX I 402
APPENDIX II 407
APPENDIX III 414
INDEX 417

ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW

CHAPTER I

CLASSICAL INFLUENCE: A SURVEY OF MARITIME LAW TO THE ELEVENTH CENTURY

Although in the search for their origin the words "Admiral" and "Admiralty" carry our thoughts back to the Middle Ages, the ideas which they cannote are of much greater antiquity. As manufacture progresses, commerce develops, and commerce immediately requires transportation. This transport, from the earliest times until comparatively modern ones, was almost invariably by water;[1] at first, because the ancient world was situated around the shores of a great ocean, and, later, because of the hazards and continual vexations to which all mediæval traffic on land was subject.

We know of much navigation in the Minoan times, and, succeeding that, in the Mycenean and heroic periods—some historians, indeed, attribute the historic incidents forming the basis of the Trojan epic to economic and commercial causes. At the dawn of recorded history we see the Phœnicians as the master navigators, closely pressed in competition by the Greeks. Each succeeding civilization must have had its code or customs of marine and commercial law, but almost nothing has come down to us.

In earliest India and in the Iranian times, travel by sea was unknown, and the precious metals were not used for currency,[2] so that one can hardly hope to look for any origins there, nor, had there been any, is it likely that any effective legal contribution could have made its way to the widely separated Mediterranean lands.

Egyptian frescoes show us vessels of considerable size, not merely for river, but for ocean use, and Herodotus repeats the tradition of the Egyptian circumnavigation of Africa. We know of various Egyptian legal provisions, such as those limiting the rate of interest on agricultural loans;[3] we know, too, that their contracts of sale, and their loans, followed customary and general business forms; we can only conjecture, from this, established legal usages which may have made forgotten contributions during the earliest days of maritime law.

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[1] Huvelin, p. 17. Goldschmidt, pp. 28, 149, 239.

[2] Goldschmidt, p. 42.

[3] *Ib.*, p. 50.

From Babylon there came other developments, such as the establishment of forms for legal documents, which were carefully preserved, and the creation of standards of weight and measure, and a silver coinage.[4] If, as Goldschmidt writes, we then find commerce gravitating towards the Orient, that can only be because the wealth and commerce of that earlier period were concentrated there. But the Asiatic lands are not important for us because we cannot assign to them any place in the continuous development of the law; it is around the Mediterranean that our interest must lie.[5]

In the earliest days, as in the Middle Ages, we find commerce and piracy going hand in hand,[6] and piracy is even regarded as a quite legal occupation in the absence of restraining treaties, as a treaty between the Greek cities of Chalæum and Œanthia in Locris shows.[7]

Even at this early time we find that the Greek law is, for the most part, unwritten and customary,[8] and we can already recognize some of the germs of the mediæval and of the modern law. We read of the equality before the law of foreign merchants; of the informality of contracts; of an ordinary rate of interest of from 12 to 18 per cent, which was doubled for maritime loans; and of a separate commercial trial in certain matters.[9] Banking and exchange appear; commercial paper payable to bearer, and to order, is not unknown; there is a limited amount of agency, and businesses are sold or alienated as a whole.[10] In the sea loan, the chief speculative business of antiquity, is to be seen the root out of which grew, in diverse directions, the policy of insurance[11] and the bottomry bond;[12] and another great principle of the maritime law, general average, was known.[13] Of these more will be said later.

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[4] Goldschmidt, p. 49.

[5] "In den für die universalgeschichtliche Betrachtung allein in Betracht kommenden *Mittelmeerländern*," *ib.*, p. 49.

[6] Goldschmidt, p. 27. Cf. *ib.*, p. 49.

[7] *Ib.*, p. 27, n. 36—"die Piraterie, soweit sie nicht gegen Staatsvertrag verstöszt, als statthaften Gewerbetrieb." Ashburner, p. cclxii— "It must be remembered that there was no hard and fast line between the mariner and the pirate."

[8] Goldschmidt, p. 54. "Sicher ist der gröszte Theil des Handelsrechts ungeschriebenes, flüssiges Gewohnheitsrecht gewesen, wie sehr auch, namentlich in Athen, die ursprüngliche nationale Anschauung, dasz die ungeschriebene Sitte höher stehe, als der geschriebene Buchstabe, der Herrschaft der Gesetze gewichen war." Vinogradoff, *Historical Jurisprudence*, II, p. 82.

[9] Goldschmidt, p. 55.

[10] *Ib.*, pp. 55–6. "Dem hochentwickelten Geldverkehr diente ein entsprechendes Bankwesen: der Griechische τραπεζίτης steht sehr nahe dem heutigen Englischen *banker*. Inhaber- und Order-Papiere begegnen in alexandrinischer Zeit; vielleicht schon vorher freie Stellvertretung und Cession. Das "Geschäft" (die "Handlung") wird bereits als ein Ganzes (*universitas juris*) verpachtet und veräuszert."

In Alexandria there existed many of the gild features of the mediæval law—the right of pursuing an occupation was confined to members of a gild which had its own statutes, its own court, and a special commercial code, while the members who were abroad grouped themselves into specially privileged corporations and lived under their home laws, governed by their own directors.[14]

In the business world of those days Alexandria shared her important position with the island of Rhodes, whose code of maritime law has now disappeared, although in Cicero's time it was quite comprehensive, particularly in regard to general average.[15] Only one of its provisions has survived, and that is because it was preserved in the Digest of Justinian. The *Lex Rodia de Jactu,* as it is there called, contains the earliest known provision involving the principle of general average.[16] This Rhodian code, dating from the III or II Century B. C.,[17] was evidently of great authority in the ancient Mediterranean, for its principles were accepted by both Greeks and Romans, and its memory lasted for a thousand years, a compilation of the later Empire being called the Rhodian Sea Law;[18] of this code more will be said later. M. Desjardins believes that the Rhodian laws gained their great authority because of the maritime strength of Rhodes.[19] The Romans became the allies of the Rhodians, and, perceiving the wiseness and practical utility of the Rhodian laws, borrowed largely from them.

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[11] It is even possible, though Goldschmidt does not agree, that insurance companies may have existed. *Ib.*, p. 55, n. 20.

[12] "Das Hauptspeculationsgeschäft des überseeischen Verkehrs, das Seedarlehn, welches die ebenso gewagte wie im günstigen Falle höchst gewinnreiche Anlage des Groszkapitals ermöglichte, enthielt Elemente der noch nicht für sich ausgebildeten Assecuranz, wie des anscheinend seltenen Wechselgeschäfts." *Ib.*, p. 55.

[13] *Ib.*, p. 78.

[14] *Ib.*, pp. 53–54.

[15] *Ib.*, p. 56.

[16] Dig. XIV, 2. "Lege Rodia cavetur, ut, si levandæ navis gratia iactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est." Also Goldschmidt, p. 78. M. Desjardins states that in the opinion of the German savants, his contemporaries, particularly Herr Goldschmidt, the modern European legislation in regard to general average rests upon principles either Greek or Rhodian in their origin and developed by Rome. Desjardins, p. 10.

[17] Vinogradoff, II, p. 82.

[18] ΝΟΜΟΣ ΡΟΔΙΩΝ ΝΑΥΤΙΚΟΣ.

[19] Desjardins, p. 10. "Les lois de Rhodes survécurent à la puissance maritime de Rhodes."

Various other Greek cities also had their own codes, modelled, no doubt, on Rhodes. We read of summary marine courts, and of courts charged with the punishment of crimes committed at sea.[20] We know that the Athenians were familiar with the principles of bottomry contracts and that such contracts were made.[21] While there was probably a general uniformity in these laws of the Greek cities, this was not always the case. For instance, it appears from the speech of Demosthenes against Lacritum that the Greek conception of general average was unusually broad, far broader than that of the Rhodians.[22] In the case of Zenothemis *v.* Demon [23] we read of the provisions of an early Greek loan on bottomry in which we behold the provisions still familiar to us—a high rate of interest, but the loan at the lender's risk in case of shipwreck. We note, too, that the master can hypothecate cargo not belonging to him, as well as his own ship, in a foreign port (but the usual form of contract stipulated that the borrowers would not borrow any further on the security of the property hypothecated), in return for a loan, although in this case the loan does not appear to have been expended in the service of the ship.[24]

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[20] Desjardins, p. 9. "C'est un tribunal nautique spécial (*ναυτοδιχαι*) qui prononçait sommairement sur les disputes et les contestations commerciales des marins. Une autre juridiction l'*επιθαλαττιον* était chargée de punir les délits commis en mer."

[21] *Ib.*, p. 8.

[22] Ashburner, p. ccxv—"the case of a number of independent lenders, each lending upon a separate item of cargo. If part of the cargo is lost, what is saved is divisible among the lenders *pro rata*. This looks suspiciously like the doctrine under which every loss was turned into a general average loss."

[23] See article by Sir Paul Vinogradoff, III, *Tijdschrift voor Rechtsgeschiedenis*, No. 2, pp. 164 *ff.*, 1921. The principal *dramatis personæ* in the case are: Demon, an Athenian man of business; Protos, a commissioner or agent engaged in the corn trade; Hegestratos, a skipper from Massalia; Zenothemis, a Massaliot, passenger in Hegestratos' ship; Aristophon, an agent from the Piræus employed by Demon, and other Athenian capitalists. Hegestratos' ship sailed from Athens to Syracuse after the skipper had procured a loan from Athenian capitalists on the security of the ship's hull and armament. Besides this, one of the passengers, Protos, had obtained a sum of money from Demon with the view of buying corn in Sicily and bringing it back to Athens. These transactions had been concluded on the usual conditions of maritime loans, that is, at a high rate of interest, but at the risk of the lenders in case of shipwreck. In Syracuse Protos bought the corn and had it loaded on the ship. In the meantime Hegestratos and Zenothemis borrowed money from some of their countrymen of Massalia and offered as security the ship and its cargo: the sum obtained was forwarded to Massalia. When the ship had sailed on the return journey Hegestratos tried to sink it in order to get rid of all obligations: he perished in the attempt, while the ship, though damaged, reached Cephallenia. After the necessary repairs it proceeded by order of the Cephallenian authorities to Athens, although Zenothemis sought to obtain leave for it to return to Massalia. On the ship's arrival in Athens, the creditors who had lent money on the hull entered into possession and Protos wanted to take away the corn, but was opposed by Zenothemis, who claimed it as security for a loan made by him to Hegestratos. In the ensuing trial, Protos, after having offered in vain to abide by the testimony of the merchants and customhouse officials in Syracuse, made default on the day of the trial, and judgment was pronounced against him *in contumaciam*. Demon, who had laid hands on the corn as the security for his loan to Protos, met Zenothemis' suit by the speech under discussion. The decision in this case is not known.

In the time of Demosthenes the maritime loan took a form which it retained for many centuries,[25] until well into the mediæval period, and it seems certain that the mediæval maritime loan contract was identical with the classical contract in the most important features.[26] It is from the later forms of this contract that the contract of insurance developed.[27]

The Greek law, like the mediæval law, had a considerable customary element. "The law was based on constantly recurring business arrangements, and on the fact that the courts accepted the documents as conclusive evidence. . . . Customs originating in agreements between shippers, merchants, bankers and crews gathered force, and were supported by the tribunals." [28]

We must now turn to Rome. In its earliest days the Latin language lacked words to express sea terms,[29] and it is a matter of history that the Romans first built large ships in the time of the Punic wars. We probably shall not be wrong if we infer that the Romans, knowing nothing of sea travel, lacked sea laws, and it will not be surprising to see that the sea laws of the later Roman Republic followed, as we have already mentioned above, those of Rhodes,[30] so that the principles embodied in those two systems became substantially universal.

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[24] A good general discussion of the Greek maritime loan is to be found in Ashburner, pp. ccxii-ccxvi.

[25] *Ib.*, pp. ccx, ccxi—"the terms in which the [maritime] loan was expressed remained substantially the same from the age of Demosthenes till the thirteenth century. . . . In the Greek documents there is a hypothecation of ship or cargo . . . and the loan is made repayable upon the safe arrival of the subject hypothecated. . . . In the mediaeval documents the loan is generally expressed to be repayable if the ship, or if the ship or the greater part of its cargo, argives safe. There is sometimes, but not normally, a specific hypothecation . . . the loan often resembles an ordinary loan upon a contingency, and there is evidence that both in antiquity and the middle ages the forms of a maritime loan were made use of for contracts which were purely aleatory."

[26] *Ib.*, p. ccxxxi.

[27] Sir William S. Holdsworth in 17 *Columbia Law Review*, p. 86.

[28] Vinogradoff, II, p. 82.

[29] Goldschmidt, p. 62.

The first feature of the Roman law that one notices in contrast to the previous systems [31] is its abstract and sharply defined nature. Another feature of the Roman law which seems most unusual to a Continental lawyer is one that attracts no attention from an Anglo-Saxon. Alone among the world's great legal systems [32] the Roman and the English [33] possess no separate organization of mercantile tribunals [34] and mercantile law, but have developed their commercial and maritime law as a part of the ordinary law, whose unity [35] has been maintained. For this lack many explanations have been given. Both by Goldschmidt [36] and by Morel [37] very similar reasons have been suggested—that it was contrary to the centralizing genius of the Roman law, and that it was contrary to their tradition of its unity. The historical reason is urged, that, as we have noted, the early Roman commerce was both primitive and limited, and so, requiring but little regulation, grew up within the general law, and remained there until long after it had spread beyond all originally conceivable limits.[38] Again, it is suggested that the Roman law was not as deficient in dealing with commercial and maritime matters as we might suppose it to be from a glance—that undoubtedly many matters which we now treat separately in our system were then settled under general or abstract provisions [39] of the law. Best of all is Morel's suggestion [40] that as the parties had the choice of the judge it was probable that they would choose an experienced man, having a good technical knowledge of their particular problem—if they were merchants, they would choose a merchant, and the suit would to some extent partake of the nature of an arbitration. In the *pax Romana,* the unchallenged security [41] of the merchant throughout the world, the absence of piracy because of the Roman control of the seas,[42] and the general excellence of communications on land, also, further reasons may be found. None the less, Goldschmidt felt that this arrangement left gaps, and that it should have been considered more comprehensively,[43] but the present author feels that the learned German viewed the question with the perfectly natural feeling of a Continental favoring the system to which he was accustomed.

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[30] Desjardins, p. 11. They were probably adopted about 55–51 B.C.

[31] Goldschmidt, p. 50.

[32] Holdsworth, *H.E.L.*, V, p. 65.

[33] Morel, p. 15, n. 3. "Au point de vue du développement des institutions juridiques, rien ne rappelle mieux l'esprit romain que l'esprit anglais. L'on sait que les Anglais abrogent rarement même les dispositions les plus démodées. Leur législation inextricable ressemble à une immense forêt où la hache ne passerait point, mais où l'on planterait sans cesse de nouvelles essences plus vigoureuses que les anciennes et destinées à les étouffer peu à peu."

[34] *Ib.*, pp. 12–13.

[35] Goldschmidt, p. 72, "Die römische Rechtsentwickelung überall einen *einheitlichen* Charakter zeigt."

[36] *Ib.*, p. 71. "Aber ihrem energischen Abstraktions- und Centralisirungstriebe, welchem die Idee der Person (der abstrakten privaten Persönlichkeit, dann der privatrechtlichen Gleichheit aller Freien) und der Sache (des körperlichen Gutes) Ursprung und konsequente Durchführung verdankt, widerstritt durchaus der Gedanke eines den Handel, ja auch nur die gewerbliche Thätigkeit als solche regelnden *besonderen* Rechtszweiges."

[37] Morel, pp. 15–16. "Un troisième motif enfin, c'est que l'existence d'un droit particulier aux commerçants choquait au plus haut point l'idée que les Romains avaient de l'unité du droit. L'esprit des Romains était essentiellement traditionaliste. Ils tenaient, tout en corrigeant le passé, à avoir l'air de le respecter. Aussi, quand ils voulaient opérer une réforme, ne recouraient-ils jamais à une addition ou à une suppression franchement avouée."

[38] *Ib.*, p. 14.

Under these regulations the Roman commerce undoubtedly flourished, and frequent voyages were made in the Atlantic Ocean, in the Red Sea and in the Persian Gulf, while regular communications were kept up with the North Sea, the east coast of Africa, and the Indian Ocean. Commercial intercourse existed with distant China, and with India, and large grain fleets provisioned Rome. For speed and for general distance covered, the merchant shipping of that period was not excelled until the modern steamship came in.[44]

We come now to a summary of the Roman law [45] with particular reference to its influence upon the mediæval and modern sea law, an influence that has been considerable,[46] although not very much of the substantive law itself has come down to us without change or addition. For the most part [47] Rome has contributed principles which later days have developed and amplified into a very considerable part of the maritime law,[48] and, while the Middle Ages carried the Roman law to a more complete development, it was on a volume of business certainly no greater than that of classical times.[49]

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[39] Goldschmidt, p. 79.

[40] Morel, pp. 15–17.

[41] Holdsworth, *H.E.L.,* V, p. 65.

[42] Goldschmidt, pp. 65–66.

[43] *Ib.,* p. 72. "Lag nun hierin möglicherweise insofern eine Lücke, als vielleicht auch in der römischen Kaiserzeit die eigenthümlichen Bedürfnisse des damaligen Welthandels eine noch umfassendere Berücksichtigung im Recht erheischten."

[44] *Ib.,* p. 67–68. "Weite Hochseefahrten auf gewaltigen Schiffen auch im Atlantischen Ocean, im rothen und persischen Meer sind üblich. Riesige Getreideflotten versorgen Italien, später Byzanz, mit den nothwendigsten Nahrungsmitteln. Die regelmäszige Handelsschiffahrt umfaszt so gut die nordischen Meere, wie die Ostküste Afrikas und den indischen Ocean; mit Indien, ja mit China bestehen ausgedehnte Handelsbeziehungen. Die Durchschnittsgrösze wie die durchschnittliche Fahrgeschwindigkeit der römischen Kauffahrteischiffe stand hinter Grösze und Schnelligkeit sogar der modernen Dampfschiffe vor den neuesten Verbesserungen kaum zurück." *Sed quaere*—the clipper ships.

[45] The Digest's maritime provisions will be found set forth at length in Pardessus, i, pp. 85–132, and see Desjardins, Ch. 2, generally.

THE PARTIES TO THE MARITIME ADVENTURE [50]

Roman law distinguishes the *dominus navis,* the *exercitor,* the *magister,* and the *nautæ.* The *exercitor* is known by the fact that he receives the profits of the ship for his own benefit: he may be the owner or he may have hired the ship from the owner. He is not to be confounded with a merchant who puts in the entire cargo, since the merchant pays over the freight to the *exercitor,* while the *exercitor,* even if not the owner, may keep the freight himself, for his obligation is only to pay a definite rent. As against all third parties he is owner.

The *exercitor* appoints the ship's officers, among others the *magister, cui totius navis cura mandata est,* as Ulpian says (Dig. XIV, 1, 1, 1). Among the *magister's* duties are to contract for cargo or passengers, to buy tackle for the ship, to buy or sell goods, to incur expenditure for repairs, to hire and pay the seamen (Dig. XIV, 1, 1, 3, 7). These duties are all financial and administrative. He may also have been concerned with the navigation, which, however, was usually in the hands of the *gubernator* (Dig. IX, 2, 29, 4; XIX, 2, 13, 2).

The *exercitor* might act as *magister* on his own account, and there might be several *exercitores,* each being his own *magister,* or all uniting in appointing one (Dig. IV, 9, 7, 5; XIV, 1, 4, pr. 1). A ship might have several *magistri,* each performing all his duties independently, or the *exercitor* might provide that they were to seek each other's consent, or the duties might be divided; one man to let the ship, another to collect money due, etc. (Dig. XIV, 1, 1, 13, 14).

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[46] Goldschmidt, p. 45. "Wenn die 'heutigen nationalen Volkswirthschaften und die heute sich bildende Weltwirthschaft ein Ergebnisz des ungeheuren Anlaufs der Verkehrs- und Handelsausbildung' sind, so finden sich die Anfänge der Weltwirthschaft doch schon im römischen Reich und es sind bereits in der gleichen Periode die Keime des in der Gegenwart mächtig anschwellenden *Weltrechts* gelegt."

[47] *Ib.*, p. 40.

[48] *Ib.*, p. 41. "Das heutige Recht des Kaufs, Frachtvertrags, Kommissionsgeschäfts ist seinem Kern nach römisch, aber stark beeinfluszt von germanischen und spezifisch merkantilen, dem Mittelalter wie der Neuzeit angehörigen Rechtselementen."

[49] *Ib.*, p. 45.

[50] This and the following paragraphs are chiefly an abridgement of Ashburner's lengthy discussions of points of law involved in the Rhodian Sea Law.

The *mercator* and the *vector* are sharply distinguished. The *mercator* is one who ships cargo; he may travel with it himself or send a supercargo. The *vector* carries only personal belongings, although he may bring with him goods of great value but small bulk, such as gold, silk, or jewels.

THE SHIPOWNER'S RESPONSIBILITY

If the shipowner agrees to carry goods safely *(salvum fore recepit)* he is bound to deliver them at the journey's end in the same condition as when they were received (Dig. IV, 9, 1 pr.), even if the goods were lost or injured without his fault (Dig. IV, 9, 3, 1). He is responsible for the acts both of passengers and sailors (Dig. IV, 9, 1, 8, 3 pr.) and is relieved only if the loss or damage occurred by *damnum fatale,* such as pirates or shipwreck (Dig. IV, 9, 3, 1). The *exercitor* is liable for his own receipts and for those of the *magister* (Dig. IV, 9, 1, 2); also for receipts by an agent to whom he has specially directed delivery to be made (Dig. IV, 9, 1, 2), or by agents who from their position have an implied authority to receive (Dig. IV, 9, 1, 3). The *exercitor* is taken to receive by the mere fact of the goods being put on board, and there may be a receipt even before the goods are on board (Dig. IV, 9, 1, 8; 3, pr.). The rule applies not merely to cargo but to the personal baggage of passengers, and provisions taken for the voyage (Dig. IV, 9, 1, 6; 4, 2): it applies even though the goods do not belong to the person who put them on board, if he has an interest in their safe arrival, as, a pledgee (Dig. IV, 9, 1, 7). The *exercitor* is not obliged to take anyone on board, or his goods (Dig. IV, 9, 1, 1); where he does, he may relieve himself from responsibility, by announcing that the passengers are to look after their own goods, if they consent (Dig. IV, 9, 7, pr.).

If a sailor on board commits a theft or assault, the injured person has a remedy against the *exercitor* (Dig. IV, 9, 7, pr.; XLIV, 7, 5, 6; XLVII, 5, 1, pr.). Acts done by a sailor off the ship do not affect the *exercitor* (Dig. IV, 9, 7, pr.), nor is the *exercitor* liable for the acts of a passenger (Dig. XLVII, 5, 1, 6) unless also serving as a seaman, and then only *qua* seaman, but he is liable for wrongs done him by another seaman (Dig. IV, 9, 7, 2), nor is he liable for acts done by the sailors to each other (Dig. IV, 9, 7, 1). The injured person also has a direct remedy against the sailor. If a sailor steals goods which the *exercitor* has undertaken to carry safely, the person robbed may elect to sue either the *exercitor* or the sailor. With certain exceptions, the *exercitor,* since he has undertaken the risk, may sue the sailor for theft (Dig. IV, 9, 3, 5; 4, pr.; XLVII, 5, 1, 4).

The *exercitor* is liable on the contracts of the *magister* made within the limits of his authority, but not on those made by a seaman (Dig. XIV, 1, 1, pr. 2). The jurists do not seem agreed as to how far a person dealing with a *magister* is entitled to rely on his apparent authority.

If the *magister* borrows money he must state that the loan is made for the purposes of the ship, and the lender must have reasonable grounds for believing the truth of the statement, for example, if the borrowing is for repairs he must know that repairs are necessary and that the sum is not excessive (Dig. XIV, 1, 1, 9; 7, pr.). One who contracts with the *magister* may at his option sue him or the *exercitor* (Dig. XIV, 1, 1, 17), but if he has sued one he cannot sue the other, and a payment made by one diminishes the other's liability *pro tanto* (Dig. XIV, 1, 1, 24). Where there are several *exercitores* each one may be sued *in solidum,* and if they have appointed one of their number *magister,* any one may be sued on his contracts: where several are acting as independent *magistri,* contracts made with one do not bind the others (Dig. XIV, 1, 1, 25; 4, pr. 1). In practice, if not in strict law, the *exercitor* could sue on the *magister's* contracts (Dig. XIV, 1, 1, 18).

THE SHIP

Some vessels are cargo boats, others are passenger boats (Dig. XIV, 1, 1, 12), but the distinction is one of fact rather than law.

JOINT OWNERSHIP

The division of a ship among several owners was recognized, but it was probably the exception in the Roman Empire.

THE NAME OF THE SHIP

In the classical times ships had names, but they disappeared again until the XIII Century. Mr. Ashburner disagrees, therefore, with the statement of Goldschmidt, p. 338, "Das Schiff führt seinen festen Namen," as one of the differences between Roman and Romanesque law.

THE WINTER CESSATION OF NAVIGATION

Except in emergencies, in classical times navigation ceased from November until the beginning of March. The Roman rule of prudence later became a mediæval rule of law.

THE SHIP'S CAPACITY

There were several methods of calculating capacity: *amphoræ modii* and *cupæ*. If the first, it indicated that the ship could load the total number of *amphoræ* at which she was rated. The *modii* may have indicated displacement, but possibly it, too, was a practical loading estimate.

REGULATIONS AS TO FOOD AND DRINK

The merchant or passenger seems to have supplied himself with food (Dig. IV, 9, 4, 2; cf. IV, 9, 1, 6): if there was a dearth it all went into the common stock (Dig. XIV, 2, 2, 2). The sailors were probably fed by the *exercitor*.

DANGER FROM PIRATES

Under the Empire piracy had practically disappeared from the Mediterranean, and it is rarely mentioned in the Digest. It gave rise to general average contribution as far as regarded the ransom of the ship, but, as regarded the cargo, each shipper was to bear his own loss (Dig. XIV, 2, 2, 3). On the other hand, there is quite a little mention of wreckers and heavy penalties are decreed against them (especially in Dig. XLVII, 9). If a merchant had to pay ransom to land robbers there was no contribution.

CHARTER PARTY

Papyrus 948 of the British Museum is a charter party of 236 A. D. The captain-owner of a ship lets it to *X* for a stated voyage, the load to fill the whole ship, and the agreed freight being 100 silver *drachmai,* the payment of 40 at that time being acknowledged, and the remaining 60 being due on delivery of the cargo. The captain will deliver the goods safe and uninjured from sea dangers, and will load them in two days: he is to remain four days at the port of discharge, and if he is kept longer he is to receive 16 *drachmai* per diem. He is to provide a proper crew and proper equipment for the ship. He signs the document.

LIABILITY TO PAY FREIGHT

The shipowner's contract to carry the cargo is a contract to carry it to its destination. Failing this, there is no *prima facie* right to freight *pro rata itineris,* and, if the freight has been previously prepaid, the merchant is *prima facie* entitled to recover it (Dig. XIX, 2, 15, 6).

AVERAGE, JETTISON, AND CONTRIBUTION

General average, as we have seen, goes back to the Greek times,[51] and its fundamental principle is stated in the *Lex Rodia de Jactu.* The Roman law follows this same principle and is of importance because it is in accord with the modern law,[52] that, if goods are thrown overboard in order to lighten the ship, *what is sacrificed for the common benefit should be made good by a common contribution* (Dig. XIV, 2, 1 pr.). "It is settled," wrote Hermogenianus, "that an equity of contribution only exists when there is a common danger, and by the help of jettison the interests of others are protected and the ship is saved" (Dig. XIV, 2, 5 pr.).

The ordinary occurrence is that provided for in the *Lex Rodia,* where the goods are thrown overboard in a storm to lighten ship. The same principle applies where cargo is transshipped into a lighter to lighten the ship and the lighter sinks (Dig. XIV, 2, 4 pr.; Paul. Sent. II, 7, 4). If goods which covered other goods are thrown over-

[51] Goldschmidt, p. 78.

[52] *Ib.,* p. 40; p. 79, n. 93.

board, and the exposed goods are wetted, there is contribution for their deterioration (Dig. XIV, 2, 4, 2).

But the sacrifice must have the effect of ensuring the common safety. That is, in Roman and in modern law, the essential condition, and contribution will take place if the common safety is assured at the moment of the sacrifice, even if the vessel should later be wrecked. If goods are brought up from the wreck they contribute to goods thrown overboard previously (Dig. XIV, 2, 4, 1; Paul. Sent. II, 7, 3 (2)).

There was some hesitation to grant contribution where the ship was injured, but Papinian and Hermogenian admitted it where the mast or tackle were sacrificed to save the common venture (Dig. XIV, 2, 3 pr.; 5, 1). There is no contribution where the ship has to be repaired as the result of a storm (Dig. XIV, 2, 6 pr.), nor where the ship is wrecked and part of the cargo is saved (Dig. XIV, 2, 5 pr.; 7 pr.).

Ransom from piracy gives rise to contribution, but not if from land robbers (Dig. XIV, 2, 2, 3).

Everything which has been benefited must contribute, and not merely cargo—gold and jewels, articles of domestic apparel and ornament, the ship herself. Consumable stores do not contribute; it is not stated that freight does; nor do free men, because free bodies cannot be valued (Dig. XIV, 2, 2, 2); the same reason was formerly given by the English Admiralty for not granting life salvage if no property had been saved.

The things saved and the things sacrificed are valued by a double rule; the latter as of the time of loss, without regard to the profit hoped for from the future sale; the former at their sale price (Dig. XIV, 2, 2, 4). If goods are injured by wetting only because the water happens to come in, on the occasion of a common sacrifice, they contribute according to their diminished selling price value. But if they are damaged because the removal of the goods sacrificed exposed them to the water, they are entitled to contribution in regard to their diminished value, just as much as if they had been jettisoned, and they are bound to contribute to the goods actually jettisoned only to the extent of their diminished value (Dig. XIV, 2, 4, 2).

The liability is not direct between those making and receiving contribution; it is to the captain, who can enforce payment from the one group, and to whom the others look. If the owners of lost goods sue him he may retain the saved goods until they contribute, but he is not compelled to do so (Dig. XIV, 2, 2 pr.). His liability is limited by what the passengers can pay, and he is not responsible for letting a passenger go, who later is shown to be insolvent (Dig. XIV, 2, 2, 6). If contribution has been made and the compensated owners of jettisoned cargo later recover it, the contributors may sue the captain to compel him to recover the payments made (Dig. XIV, 2, 2, 7).

The personal effects of travellers, carried on their persons, or as part of their personal luggage, receive and make contribution on the same basis as cargo.

Where a ship makes jettison or cuts the mast or runs ashore to escape pirates or corsairs, contribution might be claimed on these principles, although these cases are not expressly mentioned in the Digest.

He who throws another man's goods into the sea to save his own is not liable to an action (Dig. XIX, 5, 14, pr.). This passage applies only to an owner of cargo.

COLLISION

There was no special Roman law of collision. It was governed by the ordinary rules of *culpa* or *dolus*. If there was an inevitable accident, there was no remedy (Dig. IX, 2, 29, 2–5, cases). The Roman law of collision is only of general importance,[53] but the later codes, though, one must admit, having little in them, give some specific rules, and are therefore more important.

SALVAGE

Where goods were jettisoned to lighten a ship in peril, the better opinion was that they continued to belong to the shipper, and were not thrown over *derelinquentis animo*. Hence he who takes jettisoned goods *lucrandi animo* is a thief (Dig. XLI, 1, 9, 8; XLVII, 2, 43, 11). If a ship is wrecked, a fortiori, goods cast ashore cannot be considered as derelict (Dig. XLI, 1, 58; 2, 21, 1), but the taker is a thief (Dig. XLVII, 9, 3 pr.) and is liable to make fourfold restoration if sued within a year (Dig. XLI, 1, 44; XLVII, 9, 1 pr.), and in some cases is liable to criminal proceedings. The Treasury did not claim a wrecked ship, or things cast ashore, but restored them to their owners (Cod. XI, 6, 1).

[53] Goldschmidt, p. 79, n. 93.

MARITIME LOANS

Maritime loans are dealt with in Dig. XXII, 2, "de nautico fænore," and in Cod. IV, 33, "de nautico fenore." [54] Before Justinian the rate of interest on ordinary loans was limited to 12 per cent; but on a maritime loan there was no limit, for the duration of the risk (Paul. Sent. II, 14, 3). Both before and after Justinian interest could not be enforced on a loan unless there was a distinct stipulation to that effect (Dig. XII, 1, 11, 1; XIX, 5, 24; Cod. IV, 32, 3). Interest on a maritime loan for the duration of the sea risk was an exception [55] (Dig. XXII, 2, 7).

1. As in Greece, so in Rome, a contract for a maritime loan was not a gambling contract,[56] but on a contingency in which the parties had a pecuniary interest. *Traiecticia pecunia* is defined (Dig. XXII, 2, 1) as money which is carried over sea, or goods bought with the money and carried over sea. If spent in the place where it is lent money is not *traiecticia:* the *destination* of the money determines the character of the contract.

2. Maritime interest could only be contracted for during the continuance of the maritime risk, which begins on the day fixed by the contract for the departure of the ship, and ends, as a rule, when the ship comes in. (Cod. IV, 33, 2 (1); 5 (4); Dig. XXII, 2, 3, 4, 6). In a contract for the loan of money to be carried over sea, where the borrower takes the risk, the lender is not entitled to maritime interest (Cod. IV, 33, 3 (2); 5 (4)), and to ordinary interest only where stipulated for.

3. A maritime loan generally contained a pledge or an hypothecation, either of the goods purchased with the money lent, or to be purchased with the proceeds of sale of these goods, or of other goods belonging to the borrower and sailing on other ships (Dig. XXII, 2, 4), or of the borrower's land. The pledge or hypothecation did not enlarge the lender's rights, for he could not retain the subject property as a security for interest beyond what he would be other-

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[54] Goldschmidt, p. 78. We have seen that *fœnus nauticum* was of Greek origin. And see Nov. 106 for the existence of local modifications of the Maritime Loan.

[55] Goldschmidt, pp. 85–86. "Die Herabsetzung der gesetzlichen Zinstaxe—unter Privilegirung jetzt der Kaufleute (*besses usuræ*) und des nicht mehr eximirten Seedahrlehnsgeschäfts."

[56] Goldschmidt most heartily disagrees, p. 239. "Das wichtigste Spekulationsgeschäft der alten Welt, das Seedahrlehen." So does Lefort, Introduction to French edition of Bensa, p. vii, "qui donnait certainement lieu à des vastes spéculations."

wise entitled to (Dig. XXII, 2, 4 pr.) nor had he any rights against it if a maritime loss occurred (Dig. XXII, 2, 6). His advantage lay only in this, that he had an additional security against which to enforce judgment if the property primarily liable was lost or insufficient.

4. There was a penalty if the loan with interest was not punctually paid, but in what the penalty consisted is not clear.

The maritime loan rested on these Græco-Roman foundations until the close of the Middle Ages,[57] but it also developed in two important directions. In one of its later developments it became the loan on bottomry,[58] and in the other it prepared the way for the Italian development of insurance law in regard to premium insurance,[59] though mutual insurance developed out of the peculiar ideas of the Middle Ages as to general average,[60] whereby every loss was repaid from the common fund, as we shall see when we come to consider the Rhodian Sea Law.

NEGOTIABLE PAPER AND EXCHANGE

In yet another field one meets early traces of insurance law in the matter of the transfer of money *sine periculo creditoris,* as mentioned in Cicero and in other writers, the clause later becoming the *salva in terra* so much used in mediæval documents of exchange.[61] Written money orders to and from foreign places performed, though imperfectly, the service of the modern bill of exchange, but in a field hardly more restricted than at the commencement of the Middle Ages. One meets, too, an imperfect form of cheques payable to order [62] or to bearer,[63] but in the light of one of Cicero's passages [64] one knows that the Romans must have had a well developed system of banking.

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[57] Goldschmidt, p. 40.

[58] *Ib.,* p. 40. Desjardins, p. 13, "La théorie française des contrats à la grosse procède directement du titre *de nautico fœnore.*"

[59] Goldschmidt, p. 78, n. 93. "Mittelst *pacta adiecta* waren assecuranzähnliche, mittelst *stipulatio* wahre Assecuranzgeschäfte möglich; im *fœnus nauticum* steckte schon die Assecuranz auf Prämie, in *societas* und *collegium* mögliche Gegenseitigkeitsversicherung." *Ib.,* p. 81, "Aus dem Seedahrlehn entnahm man den Grundgedanken der anscheinend noch nicht als eigenthümliches Geschäft ausgebildeten Assekuranz auf Prämie, das "*periculi pretium.*" *Ib.,* p. 40, "Das heutige Assekuranzrecht hat zwei sich mannigfach verschlingende Wurzeln: das antike Seedahrlehnsrecht, welchem die Seeversicherung auf Prämie und das Recht der genossenschaftlichen, überwiegend germanischen Verbindung, welcher die Gegenseitigkeitsversicherung entsprungen ist."

[60] *Ib.,* p. 81. *Ib.,* 104. The Roman jurists came near to the concept of an insurable interest. Goldschmidt cites l. 10–15 pr. D. de furtis (47, 2).

[61] Goldschmidt, p. 94.

It is proper to note in this place, too, before passing on to consider the later Empire, that maritime insurance was known and was in use in the Persian Gulf from the early years of the Christian era,[65] and that caravan insurance, and mutual insurance of beasts or even ships, is mentioned in the Babylonian Talmud as early as the IV Century A. D.[66]

It will be remembered that during all the years of the Roman Empire, the Mediterranean, at once the center of the then known world and its chief highway, was in Roman control, and under Roman laws. Because of this, the laws of the sea were uniform and universal, a characteristic never completely lost, even in our own times, although it is not true today in anything like the extent that it then was. Indeed it cannot be too strongly emphasized that throughout classical antiquity, through the Dark and Middle Ages, and until comparatively recent times the greatest characteristic of maritime law has been that its uniform provisions were known and enforced in every seaport of every nation. From time to time the law has changed and has developed, but even in the days of the universal legislative authority of the Roman Empire no great and radical changes were ever made, so that it has always been a matter of slow growth.

M. Desjardins has well observed that the uniformity and continuity of marine law has arisen out of the needs and customs of sea-borne commerce, which are, for the most part, unchangeable, and he aptly quotes Pardessus to the effect that "uniformity is of their essence." [67]

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[62] Goldschmidt, p. 92, "vel cui iusserit."

[63] *Ib.*, p. 82.

[64] Cicero pro Font. 5, 11; "Nemo Gallorum sine cive Romano quidquam negotii gerit, nummus in Gallia nullus sine civium Romanorum tabulis commovetur."

[65] Desjardins, p. 7, "Nous citons dans notre t. VI, n. 1290, un texte qui renverse toutes les anciennes conjectures de l'érudition et atteste la pratique de l'assurance maritime dans la navigation du golfe persique dès les premières années de l'ère chrétienne."

[66] Goldschmidt, p. 356, n. 67.

[67] Desjardins, p. 2. "Il n'y a pas une autre branche du droit sur laquelle la coutume et la tradition exercent un plus grand empire. Les lois du commerce maritime peuvent être envisagées, plus que toutes les autres, comme les rapports nécessaires qui dérivent de la nature des choses. Elles ne sont pas liées à la forme des gouvernements, aux préjugés des castes, aux instincts des races, aux habitudes

This uniformity was not interrupted by the barbarian invasions. In the first place the barbarians were not people of seafaring traditions; in the next place many of the chief seaports, particularly in Italy, managed to maintain their independence: finally, the invaders permitted the conquered population to retain their Roman laws and to live under them. Witness, as late as the VIII Century, Liutprand's law De Scribis[68]—"De Scribis hoc prospeximus, ut qui chartulas scribunt, sive ad legem Longobardorum, quoniam apertissima et pene omnibus nota est, sive ad Romanorum, non aliter faciant nisi quomodo in ipsis legibus continetur," and a provision in the Lex Visigothorum[69] at a later period shows that this privilege was enjoyed by foreign merchants: "Ut transmarini negotiatores suis et telonariis et legibus audiantur. Quum transmarini negotiatores inter se causam habent, nullus de sedibus nostris eos audire præsumat, nisi tantummodo suis legibus audiantur apud telonarios suos."

"Wherever the German tribes established themselves they brought with them their personal laws, but they allowed the conquered people to observe their own customs in matters not provided for by the law of the conquerors,"[70] says Sir Travers Twiss. Out of these invasions feudalism slowly developed, and society commenced to regroup itself on that basis, but the feudal principles were not extended from the land to the ocean, both because they were inapplicable and also because the great maritime and commercial cities almost always preserved their independence of the new kingdoms or else purchased it at an early stage in their development.

"We find, accordingly, that when the Norman princes had succeeded in subjugating the southern provinces of Italy, they were careful, after establishing their political supremacy over the country, not to interfere with the civil autonomy of the more important maritime cities, but to allow them to continue to enjoy their municipal liberties, amongst which was the right of entering into mutual relations of commercial intercourse with other cities. This inter-communal freedom of municipal life was a legacy of Imperial Rome."[71]

The *Lex Romana Burgundionum,* compiled by Burgundian

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particulières des différentes nations; elles reposent avant tout sur les nécessités de la navigation maritime, pour la plupart immuables. C'est pourquoi Pardessus a dit que 'l'uniformité est de leur essence.'" Also Holdsworth, *H. E. L.,* V, p. 62.

[68] Troya, *Codice Diplomatico Longobardo.*

[69] Lex Visigothorum 11, 3, 2, cited in Goldschmidt, p. 105, n. 32.

[70] *Black Bk. of Adm.,* IV, p. xciv.

[71] *Ib.,* IV, p. cx.

monarchs for the use of their Roman subjects, contains maritime provisions which follow the old Roman rules,[72] being chiefly taken from the Theodosian code, the post-Theodosian novels, the codes of Gregory and of Hermogenian, from a work of Gaius, and from the Sentences of Paul.

Under the Visigoths the Breviary of Alaric, deriving mainly from the Theodosian code, the Institutes of Gaius, and the Sentences of Paul, and containing such principles of maritime law as jettison, contribution, loans on bottomry[73] and the ownership of a vessel constructed out of another person's timber, was abrogated by Reccesvind's *Forum Judicium,* the later *Fuero Juzgo,* a composition of Visigothic edicts, and Roman and canon laws, which forbade the application of the Roman Law by the courts; but, as no mention is made regarding the hiring of ships, the obligations of shipowners, shippers and seamen, collisions, jettison, contribution or loans on bottomry, Pardessus has rightly conjectured that one cannot make up the deficiency without having recourse to the Roman law.[74] But when the Franks had displaced the Visigoths in Gaul the Roman laws were again placed in force over the Gallo-Romans.[75]

It is certain that there was considerable commercial activity in Gaul in the late VI Century, because the Franks were in commercial relationship with most of the other countries bordering on the Mediterranean and this commerce was carried on chiefly by Syrians. Perhaps the contemporary authors used this term in a strictly geographical sense: more likely it was used to denote Orientals in general in a vague way similar to that by which most of the peoples of western Europe were classified in later days as Franks by those of the eastern Mediterranean:[76] in any case St. Jerome writes of the Syrians as being energetic merchants, travelling everywhere with their merchandise and braving wretchedness, death and the invasions of the barbarians in order to advance their fortunes in the west.[77] In Merovingian times the Syrians were established not only in the ports of the south of France, such as Narbonne and Bordeaux, but also in such cities of the interior as Orleans and Tours.[78] When King Guntram entered Orleans in 585, among the crowd which came to meet him, singing his praises, was heard the tongue of the Syrians.[79] Others among the Syrians were very wealthy; one merchant so wealthy as to be able to purchase the bishopic of Paris in 591 by bribing the electors.[80] Apparently they were numerous at Marseilles,[81] which had not lost much of its ancient importance,[82] despite the Frankish conquest, and since we owe this note to the Greek chronicler Agathias[83] it is legitimate to infer that Marseilles had at that time commercial relations with Constantinople. In any case Marseilles imported paper from Egypt[84] and probably the roots of herbs[85] also. Perhaps it was through Marseilles that the wines of Italy and Gaza were imported, of which Gregory of Tours writes.[86] Certainly Marseilles seems to have been the port used by the Franks travelling to and from Constantinople either as ambassadors or for private reasons.[87]

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[72] Desjardins, p. 15.

[73] See Goldschmidt, p. 256, n. 79, for the *Lex Visigothorum* and maritime loans.

[74] Pardessus, I, p. 140.

[75] Desjardins, p. 14.

[76] Compare the doubts of Mr. Dalton in his Introduction to Gregory of Tours' *History of the Franks,* I, p. 175, and of Professor Diehl in his *Manuel d'Art Byzantin,* I, pp. 128–130.

[77] *Epist. ad Demetriadem,* ed. Maurin, IV, 2, p. 788. *Ib., In Ezech.,* 27, 16: *ib.,* III, p. 885. Procopius mentions Antiochus, "a man of Syria, but long resident in

But the connections of Merovingian France with Constantinople appear to have been closer yet, for it is not improbable that the Emperor Maurice (582–602) aided Gundovald the pretender by giving him the large treasure with which he started on his attempt in 582.[88]

It will be noted that the barbarian laws did not break the continuity of the maritime law, neither did they influence its development, and so there appears never to have been a break in the legal succession of marine laws in the leading seaports.

In the VI Century Justinian began his monumental codification of all preceding Roman law, but even at this time one can begin to see foreshadowings of the later developments.

Custom, as proved by the testimony of men having long ex-

Naples for the purpose of carrying on a shipping business." *History of the Wars,* V, viii, 21.

[78] Heyd, I, p. 20.

[79] Gregory of Tours, *Hist. of the Franks,* VIII, 1: Dalton's ed.

[80] *Ib.,* VII, 31; X, 36.

[81] Dalton's Introduction to Gregory's *History,* I, p. 175.

[82] Heyd, I, p. 23.

[83] Agathias, Bonn ed., I, 2, p. 17.

[84] Gregory of Tours, *Hist,* V, 5: Dalton's ed.

[85] *Ib.,* VI, 6.

[86] *Ib.,* VII, 29.

[87] *Ib.,* VI, 2; VI, 24; VII, 36; X, 15.

[88] Dalton's Introduction to Gregory's *History,* I, p. 178.

perience in their occupation, is seriously considered: Justinian, in 540, orders the Prefect of the East to call together the captains in order to ascertain the prevailing usages in maritime loans,[89] and although the existence of these customs was one of the reasons which made Justinian's codification advisable, our evidence shows that the customs continued to develop after the codification. The mediæval *commenda,* of which more will be said in the next chapter, finds its sources in these customs which modified and developed the existing Roman law.[90] A large part of these customs derived from Greek law or were influenced by the Greek legal development, and were incorporated into the provincial constitutions.[91]

Very important, too, is the development of the Roman corporations, forerunners, to a limited extent, of the mediæval gilds.[92] The ageing Empire found taxation one of its great difficulties, and had to resort to many and various expedients in order to collect its revenues. Its agrarian taxation was collected from an hereditary aristocracy of landed proprietors, who were held within closely determined limits by the law, and whose number was compulsorily augmented by those having a certain income—in a way, much like knighthood in the time of James I. They were of importance to the Treasury, for the certainty and assurance of the collection of the taxes was dependent on them. In the same way there were within the civic communities certain groups whose origin is traceable to the separation of the different occupations into privileged but (as regards membership) compulsory corporations, having some regulation of trade, but with a predominatingly fiscal importance. For instance there were the *navicularii,* originally tradespeople, who voluntarily undertook the supplying of the city of Rome with grain and other necessaries of life, and who later became mere contractors for transport for the city in a corporate and hereditary connection, but who concentrated in their own hands, under the later Empire, the trade and the transport of the Mediterranean and many important rivers, and thus became very powerful. Yet it was obviously necessary to grant special privileges to these corporations in order to enable them to acquire the means whereby to pay their taxes. The shopkeepers were excluded from the higher dignities and offices of the state, and the officials from the management of a business.

[89] Nov. 106, Ashburner, p. ccxix.

[90] Goldschmidt, pp. 91–92.

[91] *Ib.,* p. 75.

[92] *Ib.,* pp. 87–89.

It is to be noted that the tradespeople, or a certain class of them, and especially the bankers at Constantinople, were exempted from the provisions of the new imperial laws, and there existed an extended special jurisdiction of the officially appointed directors of the commercial corporations. The Roman legal unity was already weakening, and the commercial interests were becoming sufficiently powerful to be able to influence legislation. Thus Justinian had to submit his laws step by step to the approval of the apparently influential and, for the Imperial Treasury, indispensable bankers' corporations of Constantinople. In this way there came to be a special law for those engaged in mercantile and industrial occupations. Behind the Justinianean codification there undoubtedly existed this particular law, as well as local and provincial customary laws, and in these forms many sorts of popular law, especially commercial law and even the actual usages of commerce, must have been received and handed down to the Middle Ages.

After Justinian the influence of legislation practically disappears, as regards our subject, during the entire length of the Middle Ages, but the influence of custom comes at once to the fore and is henceforth the means by which the maritime and commercial law is developed.

It must always be borne in mind that the transition from the classic days to the Middle Ages was not suddenly made. Modern historical research has shown that Rome never "fell," in the popular sense, but that there was a slow and insensible diminution of the imperial authority in western Europe. The barbarian rulers usually were invested with the emblems of authority by the emperor[93] reigning at Constantinople, whose name and titles appeared equally upon the coinage and the legal documents of the new kingdoms. Latin continued to be the language universally written and almost universally spoken; the Roman population lived on under their Roman law and the very games continued to be given in the amphitheatres.[94] Twilight came, but so gradually that one cannot point to any two consecutive moments and say that the one is day and the other is night. Even when the time had come at which men could see that the old order had changed in the West, Rome was still Rome, albeit shorn of a part of her once vast territories. To these lost lands the Empire still maintained a claim of right, which was from time to time made good by such reconquests as those of Italy by Belisarius and Narses in the VI Century and of Basil I in the IX Century.

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[93] Procopius, III, xxv; IV, xxi.

[94] Gregory of Tours, *History,* V, 17, and Mr. Dalton's learned note thereon, II, p. 541.

Rome, then, remained eternal, and it is inaccurate, either from the then contemporary viewpoint, or on the basis of modern analysis, to style the later Roman Empire "Byzantine," at least until the abandonment by his successors of the western policy of Constans II, after his death in Sicily in 668. Moreover, whether we call the later Empire Roman or Byzantine, the fact is that for almost a thousand years the phœnix-like Empire was the bulwark of the weaker and unorganized states of western Europe. Persian, Arab and Slav alike broke the force of their onslaught against the might of the Empire: the moribund Empire nevertheless stemmed the first onrush of the Turks and western Europe paid dearly at Mohács and before Vienna and elsewhere for the folly which commenced with the Fourth Crusade.

From the time of Justinian until the XI Century the history of the maritime law is intertwined with that of the later Roman Empire. During this entire period the Empire was no less the ark than the citadel of civilization: it kept alight the torch of law, literature, industry, commerce and the fine arts from which western Europe was to rekindle the light of its own culture with the passing of the Dark Ages. The Empire alone survived the barbarian invasions, and by the advantage of its geographical position it naturally assumed the rôle of intermediary in the commercial relations between the East and the West. This position the Empire maintained until the maritime cities of Italy became sufficiently powerful to surpass it.

The connection between Italy and the Empire was always close, and it continued with but slight interruptions up to that fatal twenty-ninth of May when the Genoese Giustiniani, at the head of a Genoese contingent, was wounded grievously near the gate of St. Romanus at Constantinople just before the successful assault which brought to a simultaneous end the Empire and the life of the heroic eleventh Constantine. By this close and nearly constant connection the continuity of the law was preserved, for the older Roman law, as modified by the customs of the later Empire, must have been in force in the dependent Italian seaports until about the time of the final withdrawal of the imperial authority. This withdrawal left the maritime cities of Italy legally free to develop their own laws in their own way—which was, in general, the way of customary growth.

This legal connection between Italy and Constantinople is a matter of the greatest historical importance, and it seems so obvious that one wonders why it has not been put forward at an earlier date. It was in Italy, where the law would be best known, that the growth of mediæval commerce began, and it was in the south of Italy where the imperial influence persisted longest (lending further strength to our conclusion), that the earliest codes of maritime law were compiled.

We need not wonder, therefore, nor consider it to be the flowering of some incomprehensible seed, when we see codes of maritime law and commercial courts springing up in Italy in the XI and XII Centuries almost immediately, as historical time goes, after the officials of the Empire had left the peninsula forever.

In the nature of things definite proof can hardly be adduced at so distant a time as the present for the foregoing conclusion, but it has every element of historical probability in its favor. At no other point in the history of the maritime law is there to be found any sharp break in its development. Why then should we expect to find it at this epoch? When we find the earlier writers upon the subject expressing surprise at the sudden development of the law in Italy at the period in question, why should we not suppose their astonishment to have been based upon the insufficient information then available concerning the history of the Italian maritime cities?

If it be conceded that this link is soundly forged, then the two historically separate chains of law become one, and the progress of the maritime law is shown to have been continuous and uninterrupted throughout the entire Christian era. Should our knowledge of the law in the centuries which stretch backward from Greece and Carthage to Crete, Cyprus, Phœnicia, Egypt and Assyria become some day more ample, by fortunate discoveries, we should expect to find that the unity of the maritime law was even more ancient than we can now prove it to be.

To prove this hitherto unnoticed connection between early mediæval Italy and Constantinople it will be necessary to dip briefly and in a general way into the history of the later Roman Empire in order to show the naval strength and commercial hegemony of the Empire in the Mediterranean. Something also must be said as to the intimate political relationships of certain of the Italian cities with the Empire, which, shifting in the XI Century from the political to the commercial sphere, really continued until 1453.

Some pains will be taken to show the close connection of the later Roman Empire with Italy, because this proves the continuity of the development of the maritime law as it travels down the ages from Rome to Constantinople, back to Italy, on France and Spain, and then north to England, to the Low Countries and to Wisby in the Baltic.

In many respects the position of the later Roman Empire was unique. "Alone amongst the nations of the world the Empire maintained a systematic finance and exchequer, a pure standard coinage, and a regular commercial marine." [95]

What if the Empire did not possess the same extent of territory that it had ruled in the time of the first Constantine: it still controlled, during most of this period, the entire commerce of the Mediterranean, because of its better currency, its better manufactures, its better business customs and its better laws. "The sea-power of the Empire came later, for the control of the Mediterranean was not challenged until the Saracens took to the sea. But from the seventh to the eleventh centuries (and mainly in the ninth and tenth), the Empire developed a powerful marine of war galleys, cruisers, and transports." [96] This development was brought about chiefly by the demands of the Empire's almost incessant wars with the Arabs.

For a time during the VII Century the threat in the East was grave. Cyprus was conquered in 649, Rhodes was pillaged in 654, and in 663 Constans II deemed the peril so near that he left Constantinople.[97] This fear proved to be unjustified, although in 717 the Arabs did appear before Constantinople, and were defeated.[98] The peril in the East appears to have waned thereafter for about a century. At the beginning of the IX Century the Empire was again at war with the Mohammedans and it was at times not wholly successful at sea, although ultimately it was victorious. The Mohammedans captured Crete in 826,[99] conquered, lost and reconquered Sicily by 859,[100] seized Palermo in 831,[99] surprised Thessalonica in 904,[101] and ravaged the Ægean Sea. It was not until 961 [101] with the re-taking of Crete by Nicephorus Phocas, that the Empire can be said to have regained the undisputed control of the eastern seas.

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[95] Harrison, p. 19. Diehl, *Histoire de l'Empire Byz.*, pp. 120–121. "A la mort de Basile II [1025] . . . malgré la réglementation minutieuse et tatillonne que l'État imposait à l'industrie—Constantinople fut, on l'a dit, le paradis du monopole et du protectionisme—les chefs-d'œuvre qui sortaient des mains des artisans byzantins, étoffes de soie aux couleurs éclatantes et tout historiées de broderies, orfèvreries splendides rehaussées d'émaux étincelants, bijoux éblouissants de pierreries et de perles, ouvrages d'ivoire finement sculptés bronzes niellés d'argent, verreries relevées d'or, toutes ces merveilles d'une industrie de luxe valaient aux ateliers grecs un prestige extraordinaire dans le monde entier. Malgré les erreurs de la politique économique de l'empire et le système assez vexatoire qu'il imposait aux transactions, le développement du commerce n'était pas moins admirable. Par l'activité de ses négociants, par la puissance de sa marine, par les centres d'échanges qu'offraient ses ports et ses grands marchés, Byzance accaparait les richesses du monde entier. Par sa position entre l'Orient et l'Occident, au débouché de toutes les routes du commerce mondial, Constantinople était le grand entrepôt où affluaient tous les peuples, où s'échangeaient tous les produits de l'univers. On a calculé que, dans la seule capitale, les droits de marché et de douanes rapportaient annuellement au trésor 7,300,000 sous d'or, plus de 500 millions d'aujourd'hui."

[96] Harrison, p. 23.

On the other hand conditions in the West were more stable than in the East. "During all this epoch [717–1025], elsewhere one of continual subversion and confusion, the southern and eastern coast of Italy, Greece and its islands, Thrace, Macedonia and Asia Minor as far as the upper Euphrates, were practically safe and peaceful. . . . The administration of the Empire, its military and civil organization, remained continuous and effective in the same seat, under the same law, language and religion, during the whole period." [102]

[97] Diehl, *Histoire de l'Empire Byz.*, p. 53.

[98] *Ib.*, pp. 66–67.

[99] *Ib.* p. 84. "La guerre, reprise avec les Arabes (804), aboutit à deux graves désastres, l'occupation de la Crète par des corsaires musulmans d'Espagne (826) qui, de là, ravagèrent désormais presque impunément la Méditerranée orientale, la conquête de la Sicile (827) par les Arabes d'Afrique, qui, en 831, s'emparèrent de Palerme."

[100] *Ib.*, p. 87. "Les pirateries des Arabes de Crète désolèrent les mers orientales; en Asie Mineure, pendant vingt ans (844–863), les succès alternèrent avec les revers; en Occident, les musulmans achevaient, de 843 à 859, la conquête de la Sicile."

[101] *Ib.*, pp. 97–98. "Depuis qu'en 826 les Arabes avaient conquis la Crète, ils étaient devenus le fléau des mers byzantines. Chandax, la capitale de l'île, était le repaire de la piraterie musulmane et de là, comme de Tarse ou de Tripoli de Syrie, les corsaires arabes ravageaient toute la mer Égée. Malgré les efforts de Basile I^er^ pour réorganiser l'armée et la flotte, les escadres ennemies dominaient l'Archipel. En 904, Thessalonique était prise par Léon de Tripoli et sa population presque entière emmenée en captivité. Malgré quelques succès de la marine byzantine, en 907, en 924 surtout dans les eaux de Lemnos, les expéditions dirigées contre la Crète n'aboutissaient qu'à des désastres (911 et 949). Il fallut envoyer contre l'île "que Dieu confonde" le meilleur général de l'empire, Nicéphore Phocas (960). Il réussit à débarquer en Crète, et après un siège de plusieurs mois il emporta Chandax d'assaut (mars 961). L'île conquise fut convertie au christianisme. La maîtrise des mers orientales revenait aux Byzantins."

[102] Harrison, p. 12.

In the West an immediate and successful attempt had been made by Justinian to reëstablish the imperial authority. In 533–534 Belisarius reconquered Africa: in 535 the imperial army commenced the reconquest of Italy. Ravenna was captured in 540 and with the victory at Taginae in 552 the kingdom of the Ostrogoths in Italy came to an end. For almost five centuries thereafter the influence of Constantinople waxed and waned in Italy, but it was strong enough and lasted long enough to tide the young and weak Italian ports over the darkest days of the disorganization and anarchy of the western world.

In Spain Ataulphus and Wallia had ruled as the allies of the Empire, and the latter had handed the country back to the imperial officials and then left it. Theodoric II equally entered the country as the ally of an emperor, and indeed throughout Spain the forms of Roman government were preserved well into the VI Century. The reign of the subsequent Visigothic kings was not long uncontested, and in 554 Justinian caused the southeastern part of Spain to be reconquered. At the same period the Empire reëxtended its power over the Balearic Islands, Corsica and Sardinia.[103] There was then no power capable of contesting its dominant position on the sea, and again the Mediterranean was but a Roman lake.

The conquest of Sicily, which was commenced in 535 by Belisarius, was completed in 551. For two hundred and eighty years all of the island; for four hundred and thirty years some part of it, remained a Roman province or theme. Late in the X Century the Saracen occupation was complete. Once again the new Rome advanced to the attack: in 1027 Basil II sent an army whose progress was stopped by his death, but in 1038 Michael IV sent the victorious George Maniakès,[104] who delivered almost the entire island from the Mohammedans. The Greek influence became so firmly established in Italy and Sicily that the language and the religion lasted on almost four centuries after the Norman conquest.[105] As Dr. Chapman has shown,[106] the influence of the emperors was strong in the island as late as 1282—so strong that Michael VIII appears to have been the instigating force behind the revolt known as the Sicilian Vespers, which terminated in the occupation of the island by Pedro of Aragon and his fleet, a fleet constructed and equipped with money sent from Constantinople[107] by Michael VIII.

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[103] Diehl, *Histoire de l'Empire Byz.*, p. 30.

[104] *Ib.*, p. 133.

[105] *Encyc. Brit.*, XXV, p. 33. Diehl, *Byzance, Grandeur et Decadence*, p. 85.

[106] *Michel Paléologue, Restaurateur de l'Empire Byz.*, Ch. XIII.

Italy proper never fell completely under the power of the invader even in the earliest Dark Ages, for the maritime cities usually managed to preserve their independence. Moreover after the short occupation by the Ostrogoths, Belisarius and Narses had, as we have seen, reëstablished the Roman influence in Italy in the reign of Justinian—an influence destined to last for another five centuries, and to tide the Italian ports over the darkest days of the world's disorganization.

Justinian's code, of course, immediately came into effect, and spread all over Italy. Although the Lombards shortly thereafter conquered parts of north Italy, these parts were inland, and the conquest did not affect the maritime cities: even in the interior the Justinianean legislation continued to be well known[108] and the influence of Constantinople was particularly strong during all the VI, VII, and VIII Centuries.

There was a strong and centralized government under the Exarch, a kind of viceroy with plenary powers, who had his seat at Ravenna, and was directly responsible to the emperor. From the Exarch authority radiated out in every direction to the local authorities in the various districts, who were immediately responsible to him, and it was through the Exarchs that the earlier contact with the German emperors was made.[109]

Diehl gives an excellent and detailed account of the entire governmental system, which was unusually complete and advanced for its day. To hold the western seas there were two fleets, one at the disposition of the Patrician of Sicily, the other under the Exarch, and these fleets aided the military operations and assured the communications between Italy and the capital.[110]

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[107] *Michel Paléologue, Restaurateur de l'Empire Byz.*, p. 143.

[108] Desjardins, p. 16—"Dès l'an 568, les Lombards fondaient un nouvel empire en Italie, où les Grecs ne conservaient que Ravennes et l'Exarchat, la Pentapole, Rome et son duché. Il n'entre pas dans notre plan d'examiner ce que la conquête lombarde laissa subsister des compilations justiniennes dans la péninsule. Mais on peut affirmer que leur autorité legislative ne s'effaça pas complètement: il est très probable que les villes maritimes gardèrent le dépôt des œuvres législatives justiniennes promulguées en 554 et ne cessèrent pas de les appliquer aux contrats maritimes."

[109] Diehl, *Histoire de l'Empire Byz.*, pp. 108–109. "L'entrée en scène des Césars allemands vers le milieu du X^e^ siècle créa pourtant quelques embarras à la politique byzantine. . . . Mais les empereurs allemands obtinrent de médiocres résultats. . . . A la mort de Basile II (1025), comme en Asie, comme en Bulgarie, Byzance était toute-puissante en Italie."

Rome was under the authority of the Exarch from 536 to 755; Naples from 536 to 726, though we read of further imperial authority there in 812[111] and at much later dates after the reconquest. The dates of the periods during which Trani, Gaëta and Amalfi were subject to the Empire are uncertain, but in the VII and VIII Centuries the chief magistrates of Naples, Gaëta and Amalfi were nominated by the Exarch:[112] that these later cities were maritime powers of some importance is evidenced by the fact that their united fleets conquered the invading Saracens at Ostia in 848, in the time of Pope Leo IV. The Empire, however, was in possession of Gaëta from 877 until about the year 1000, and its authority was reëstablished at Bari in 890. We know from the treaty of Verdun that in 843 the cities of Gaëta and Naples, Sicily and the Theme of Calabria in South Apulia and Calabria still recognized the authority of the emperor at Constantinople.[113]

Amalfi rose early to commercial importance,[114] and it probably had begun to trade with Constantinople quite as soon as Venice.[115] It is mentioned by Liutprand in 968, as we shall shortly see, and the colony is also noticed by Nicetas. In the X and XI Centuries Amalfi began to trade on a considerable scale with the cities of Sicily, North Africa and the Levant.

In the time of Basil I, the Macedonian (877–886), to whom reference will shortly be made as the author of the *Basilica,* the Emperor reconquered the temporarily lost south of Italy,[116] mainly from the Saracens, under the generalship of Nicephorus Phocas, the grandfather of the later emperor. The influence of Constantinople had been strong here at all times, and the emperors had been engaged in perpetual intrigues.[117] Meanwhile the Empire was engaged in subduing the Saracens at sea, and in the reconquest of Sicily and Cyprus.

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[110] Diehl, *L'Administration Byzantine dans l'Exarchat,* p. 197.

[111] Hodgkin, VIII, p. 257.

[112] *Black Bk. of Adm.,* IV, p. ix.

[113] *Encyc. Brit.,* XV, p. 28.

[114] Goldschmidt, p. 145. "Amalfi, dessen kurze Blüthe bereits gegen Ende des 11. Jahrh. durch die Normannenherrschaft, noch mehr durch die Pisanische Eroberung (1135) geknickt wird."

[115] Finlay, III, p. 152.

[116] Diehl, *Histoire de l'Empire Byz.,* pp. 107–108. "Jamais les Byzantins n'avaient renoncé aux droits de l'empire sur l'Italie; le souvenir de Rome, l'ancienne capitale du monde romain, le souvenir de Ravenne, l'ancienne capitale de l'exarchat, hantaient incessamment leurs rêves. La faiblesse des derniers empereurs carolingiens l'anarchie de l'Italie du sud divisée entre les princes lombards et la menace croissante de l'offensive musulmane fournirent à Basile I^{er} l'occasion souhaitée d'intervenir dans la péninsule et de tenter de réaliser ses ambitions. L'empereur [Basil I], s'était donné pour tâche de restaurer dans toute

In 959, at the accession of Romanus II, official letters of notification were sent, among others, to the Doge of Venice, the Archons of Sardinia, of Amalfi and of Gaëta, the Duke of Naples, and to the Longobard princes of Salerno, Capua and of Benevento, all of whom were listed at that period as vassals of the Empire.[118] In 963 the frontier of the Empire in Italy, except for its somewhat nominal dependency of Venice, ran from Gaëta to Lesina on the Adriatic.[119] Naples, Gaëta and Amalfi were still dependencies.[120] At the same time only some of the eastern portions of Sicily were held by the Empire.[121] The commerce of the Italian cities had already developed to a considerable extent, and the heavy galleys of Venice, Pisa and Amalfi were then to be seen in the distant port of Mansourah

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la Méditerranée le prestige byzantin, de chasser les corsaires musulmans de l'Adriatique et de la mer Tyrrhénienne, de combattre les Sarrasins d'Afrique et de Sicile. Dès son avènement, il poursuivit donc en Occident une action énergique. Sans doute il ne réussit pas à reconquérir la Sicile, où Syracuse tombait en 878 aux mains des infidèles. Mais il rétablissait l'ordre dans l'Adriatique, restaurait l'alliance byzantine avec Venise, ramenait les Croates dans la vassalité grecque. Surtout il réoccupait Bari (876) et Tarenta (880), reconquérait la Calabre (885), imposait le protectorat byzantin aux princes lombards. Deux thèmes nouveaux, ceux de Longobardie et de Calabre, étaient constitués dans l'Italie méridionale: c'était une belle compensation de la Sicile perdue.

"La faiblesse de Léon VI compromit un moment ces heureux résultats. Après avoir, par la prise de Taormine (902), achevé la conquête de la Sicile, les Arabes purent envahir la Calabre et s'établir jusqu'en Campanie. La victoire due Garigliano (915) assura à nouveau en Italie le suprématie byzantine et, pendant un siècle entier, malgré la persistance des invasions sarrasines, malgré la rivalité des Césars allemands, les grecs maintinrent leur autorité dans toute la moitié méridionale de l'Italie. Là aussi le règne glorieux de Basile II consacra les efforts de la dynastie de Macédoine. La victoire de Cannes (1018), remportée par les troupes impériales sur les populations d'Apulie soulevées, rétablit le prestige byzantin de Reggio et de Bari jusqu'aux portes de l'État pontifical. Et sous l'administration impériale, habile à propager l'influence de l'hellénisme, l'Italie du sud, grâce surtout à son clergé grec et à ses couvents grecs, redevint une véritable Grande-Grèce: preuve remarquable de la puissance d'expansion, de la force d'assimilation civilisatrice qui firent au X^e^ et au XI^e^ siècle la grandeur de l'empire byzantin."

[117] Finlay, II, p. 249.

[118] Schlumberger, *Nicéphore Phocas,* pp. 23–24.

[119] *Ib.,* p. 269.

[120] *Ib.,* p. 283.

[121] *Ib.,* p. 270.

in North Africa.[122] In 968, at a formal banquet given by the Emperor at Constantinople, representatives of the Italian commercial cities were listed among the guests.[123] During the same year Nicephorus Phocas entered upon his Syrian campaign and, according to Liutprand, a partial witness, to be sure, the best troops in the imperial army were the Italian auxiliaries from Venice and Amalfi.[124]

Meanwhile the Empire was busily engaged in its perennial task of keeping the peace at sea. Nicephorus Phocas had risen to fame by his reconquest of Crete from the Saracens in 961.[125] Another stronghold of the Saracens was the island of Cyprus. Captured by them in 647, it was reoccupied in part under Justinian II (685–695; 705–711), and it was taken and retaken under Nicephorus I (802–811) and under Basil I (877–886). Its reconquest was made definitively in 964–965 under Nicephorus Phocas, and thenceforth for more than two centuries it offered an invincible resistance to the Saracen fleets.[126] A Byzantine fleet, with its own commander, was permanently based on that island from the time of the reconquest. Another division of the imperial fleet was maintained in the more distant Adriatic during the reign of Nicephorus Phocas, in order to hold the Slavonian pirates in check: because of its inefficiency Venice aided in this police work.[127]

Amalfi was still under the influence of the Empire at the time of the invasion of Otto II in 981,[128] and probably for many years later, in view of the long continuance of the imperial influence at the nearby city of Naples.

At Naples, for example, the archives contain a series of public administrative acts dating from 970 to 976, each of which bears the superscription and the regnal years of the emperors reigning at Constantinople.[129] In 981, Naples, like Amalfi, was a vassal state of the Empire.[130] During this same period there are also to be found in the Neapolitan archives some forty-one private documents, the last of which is dated in 1021, the sixty-fifth year *nostri magni*

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[122] Schlumberger, *Nicéphore Phocas,* p. 359.

[123] *Ib.,* p. 510.

[124] *Ib.,* p. 537.

[125] *Ib.,* ch. II.

[126] *Ib.,* p. 388.

[127] *Ib.,* p. 282.

[128] Schlumberger, *L'Épopée Byzantin,* p. 439.

[129] *Ib.,* p. 192.

[130] *Ib.,* p. 439.

imperatoris Basilii and the sixty-second year *fratris eius Constantini*. Like the public acts, each of these private documents also bears the superscription and the regal years of the reigning emperors.[131]

In the themes of Calabria and Apulia, which the Empire lost forever with the completion of the Norman conquest in 1071,[132] the process of Hellenization had proceeded so far that Greek, for long the official as well as the colloquial tongue,[133] remained the colloquial language for nearly four more centuries.[134] At the end of the X Century these two themes maintained very close relations, both commercial and otherwise, with Salonica, Constantinople and the other great maritime cities of the Empire.[135]

In the case of Venice it is hard to state when the imperial domination came to an end. The authority of the Empire was reëstablished at the time of the conquest of Italy in 535, was confirmed by the oath taken to Longinus in 584, and was at a much later period expressly recognized in the treaty between Charlemagne and Nicephorus I in 811; this last as the result of the reassertion of the Imperial power in Venice in 806.[136] The doge modelled the nature of his power no less than his ceremonial on that of the Exarchs of Ravenna and the emperors at Constantinople; in the IX and X Centuries and later he was proud to receive and to bear the sonorous titles of the imperial court.[137] Perhaps the independence of Venice may be said to date from March, 992, when Basil II issued a Golden Bull, really a treaty, granting to Venice privileges enjoyed by no other Italian city, among them the protection of a special jurisdiction in the ports of the Empire.[138] There follows a series of other Golden Bulls, granting to Venice privileges on terms which suggest two sovereign states dealing with each other on the basis of equality; such are the bulls of John II in 1126, of Manuel I in 1147 and 1148, of Isaac II in 1187 and 1189 and of Alexis III in 1198.[139] Manuel I even found it necessary to make treaties with Genoa, Pisa and Amalfi to counterbalance the growing influence of Venice as a result of the privileges granted her in reward for her services in the Norman war.[140] From this we can readily surmise the practical independence of the Empire of those cities at this period, and also their increasing power.

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[131] Schlumberger, *L'Épopée Byzantin*, pp. 477–478.

[132] Finlay, III, p. 37. Diehl, *Histoire de l'Empire Byz.*, p. 133.

[133] Schlumberger, *L'Épopée Byzantin*, pp. 478–479.

[134] *Encyc. Brit.*, XXV, p. 33. Diehl, *Byzance, Grandeur et Decadence*, p. 85.

[135] Schlumberger, *L'Épopée Byzantin*, pp. 474–475.

[136] Hodgkin, VIII, p. 232. Diehl, *Histoire de l'Empire Byz.*, p. 110: cf. Goldschmidt, pp. 144–145.

[137] Diehl, *Une République Patricienne, Venise*, pp. 12–14.

[138] *Ib.*, p. 20.

[139] Krumbacher, p. 367.

That the Empire's influence was of long continuance even in northern Italy is shown by an interesting note in Krumbacher in regard to a Pisan copy of the Golden Bull of 992,[141] which has just been mentioned.

With this long established connection; with this deep-rooted interest of the Empire in Italy, the investigator must conclude that only the most positive evidence *contra* could cause him to deny that the law of the later Empire was applied in the maritime cities of Italy. These maritime laws of the later Empire were in separate centuries collected in two codes, and we must now consider their nature and their contents.

The first collection of the maritime laws of the later Empire which we possess is known as the Rhodian Sea Law.[142] It was apparently compiled from earlier materials, was not to any great extent original, and it treats chiefly of loss at sea and commercial risks. Ashburner dates it in the VII or VIII Century;[143] Harrison places it during the reigns of Leo III (717–740) and Constantine V (740–775) and describes it as one of the reforms attempted by the Iconoclasts;[144] while Wagner attributes it to the VIII Century and later.[145] In one respect, however, the Rhodian Sea Law deserves our particular consideration: it shows certain new maritime usages arising out of new needs in the field of losses at sea and insurance.[146] The mass of it has had its origin in local customs,[147] and Mr. Ashburner finds traces of a South Italian origin for some of its chapters.[148]

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[140] Finlay, III, p. 152.

[141] Krumbacher, p. 367, n. 2—"Dass die lateinischen Übersetzungen, (die im folgenden allein zitiert werden können) auf authentischen Ausfertigungen beruhen, wird wohl genügend durch den Dorsalvermerk eines pisanischen Originals beweisen, womit der Logothet τοῦ δρόμου die lateinische Version als ἴσον beglaubigt und als mit dem Goldsiegel mitbesiegelt bezeichnet."

[142] See Pardessus, I, pp. 155–260; VI, pp. 481–4.

[143] *Op. cit.*, p. lxxv.

[144] Harrison, p. 25.

[145] Wagner, pp. 59–60. "Die sog. *rhodische Sammlung* . . . besteht aus drei Stücken, welche sämmtlich mit der Insel Rhodus nicht das Geringste zu thun haben . . . Während man bisher annahm, dass wir es mit einer zwischen dem 8. und 10. Jahrhundert warscheinlich am adriatischen Meere entstandenen Sammlung von Gewohnheitsrecht zu thun hätten, hat der bewährteste kenner des byzantinischen Rechts nachgewiesen, dass der dritte Theil ein Gesetz der isaurischen Kaiser aus der Mitte des 8. Jahrhunderts ist, an das sich die beiden anderen Theile später angeschlossen haben."

[146] Desjardins, p. 22.

The Rhodian Sea Law is divided into three parts.[149] Part I is a prologue, which purports to give an authorization to the sea law from the declarations of various Roman emperors. Most of this is demonstrably false. Part II consists of nineteen chapters, mostly very short. The first seven establish what shares the various members of the ship's company take in the profits of the maritime adventure. Chapter 8 to 13 regulate the internal police of the ship—determine the space to be allotted to each passenger; limit the number of servants a merchant may bring; fix the water allowance, and forbid certain dangerous acts. Chapters 14 and 15 limit the captain's liability for a passenger's valuables to the case where they have been deposited with him. Chapter 16 provides a method of valuing the ship for general average purposes. Chapters 17 to 19 deal with maritime loans and loans in general. Part III contains 47 chapters, generally grouped together according to the subject. Again the first chapters are questions of police. Chapters 1 and 2 deal with the theft of a ship's anchors or tackle; Chapter 3 with thefts by a sailor from a merchant or passenger, and Chapter 4 fixes the responsibility as between captain and passengers for going to a place where thefts are frequent. Chapters 5 to 7 relate to fights, whether of sailors among themselves, or of the captain or merchants with sailors, and determine the responsibility for personal injuries. Chapter 8 establishes the liability and the remedy where captain and crew abscond with the ship and its contents. Chapter 9 deals with jettison and its results, and Chapter 10 fixes the responsibility for injury to ship or cargo where one of the parties is to blame. Chapter 11 is hortatory.[150] It advises merchants not to load heavy and valuable cargoes in old bottoms. It does not sound like a legal rule, but it may perhaps be understood as limiting the conditions under which the owners of freight are entitled to demand contribution. Chapters 12 to 14 treat of deposits, 13 substantially reproducing 14 and 15 of Part II. Chapter 15 relates to cases where the ship is obliged to put off suddenly and leave passengers behind. There is an incidental reference to deposit, probably the reason why it is put here. Chapters 16 to 18 deal with maritime loans or maritime partnerships. Chapters 19 to 25 (except Chapter 21) deal with the hiring of the ship by the merchants. Chapter 21 deals with contribution between two shipowners or two owners of cargo. Apparently it is inserted there because, like 20, it refers to a case where there is no written contract between the parties. Chapters 26 to 44 (excepting 42) deal mainly with the question of contribution, i. e. the extent to which, where there is a maritime loss, ship or cargo in so far as saved is to make good ship or cargo in so far as injured or lost. Under Chapter 26, sailors or captains who sleep off the ship are responsible for injuries done to the ship in their absence. Chapters 27 to 33 fix the merchant's liability to contribute to injuries to the ship either while it is being loaded (27–29), while it is on the voyage (30–32), or after it has been unloaded (33). Chapter 34 fixes the liability for injuries to goods of a character particularly subject to injury by damp. Chapter 35 provides for contribution where the ship's mast is broken or cut away. Chapter 36 deals with collision. Chapters 37, 40, and 41 fix the proportions in which, where the ship is lost, contribution is to be made by money and other articles of great value in small compass, if saved. These provisions partially repeat 30 and 31 and could logically follow the latter chapter. Chapters 38 and 39 treat of grain ships or ships carrying provisions, and provide for contribution either where the cargo or where the ship is injured. Chapter 42 gives the captain authority to transfer the cargo to another ship where the original ship springs a leak. Chapters 43 and 44 contain very general provisions as to contribution. Chapters 45 to 47 deal mainly with salvage and the rewards of salvors.

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[147] Goldschmidt, p. 100. "Neben dem in dieser Hinsicht noch nicht ausreichend durchforschten umfangreichen Material geschriebenen byzantinischen Rechts wird umfassender Handelsgebrauch fortbestanden haben."

[148] Ashburner, p. cxiii.

[149] This account is taken from Ashburner, pp. xiii–xv.

[150] Like § 29, Laws of Oléron.

Such is the earliest code of sea laws that we possess, and its importance lies in the fact that it must have had a great influence in Italy just before the time when the Italian sea law was about to develop.

The Rhodian Sea Law was not a bad code for its day, and it was certainly in use in the south of Italy for six or seven hundred years.[151] The later laws of Oléron are not so extensive in regard to the subjects covered, though somewhat better developed, and provisions of the Rhodian law are sometimes taken over very closely,[152] though the connection is probably indirect, and only a proof of the general unity and similarity of the early sea law. The Rhodian Sea Law itself is composed of very different sorts of materials. The hortatory Chapter 11 may have come from a treatise similar to Malynes' later *Lex Mercatoria;* parts of it may be the law-giving of the later Emperors; but, for the most part, it derives from custom,[153] and herein we see the legal methods of the Middle Ages already at work.

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[151] Wagner, p. 60. "Trotz der Basiliken behielt die Sammlung fortdauernd im oströmischen Reich Geltung, auch in Süditalien noch lange nach der Losreissung von Byzanz (bis zum 15. Jahrhundert)." Ashburner, p. xlix.

[152] Such as § 4, Oléron, and § 42 (Part III); § 21, Oléron, and § 26 (Part III); § 22, Oléron, similar to §§ 28–29, (Part III), etc.

There is one novel set of provisions in the Sea Law which certainly demands special mention, for the Roman (and modern) principle of contribution in general average as based upon a deliberate sacrifice resulting in the common safety is completely departed from, and a new and very different rule is laid down, amounting to mutual insurance of each other by ship and cargo. If the ship is wrecked, dismasted, or loses her tackling, is run into, burnt or attacked by pirates; if the cargo is lost, wetted or plundered, and if no one is to blame for the loss, the Sea Law lays down in many places that ship and cargo, so far as saved, are to contribute to ship and cargo, so far as lost. The common safety resulting from a deliberate sacrifice is not considered, for it is only necessary, in order to have contribution, that there shall have been a loss without the owner's negligence and without the responsibility of any other person in the maritime adventure. The result follows that, by participation in the voyage, one mutually insures, and is insured by, the ship and the property of the other shippers.[154]

One other very curious group of provisions must be noticed as indicating one of the possibilities of danger to which maritime travel was always subject. Under Roman law articles of great value in small space, such as gold or jewels, carried on the body or as personal luggage, received and made contribution on the same basis as any part of the cargo. It is incorrectly supposed that Chapters 30, 31, 37, 40, and 41 carry out the Roman rule, except in fixing a limit to the amount of contribution. In Mr. Ashburner's opinion[155] the percentage payable by the owner had nothing to do with contribution, but was a reward payable to the captain and seamen, partly perhaps for their exertions in salving the goods but more especially for their self-restraint in not knocking the merchant or passenger on the head and pocketing his property. It must be remembered that the mariner and the pirate were often the same person at different times.

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[153] Ashburner, p. cxiii.

[154] *Ib.*, pp. cclvii–cclix. Goldschmidt, p. 117. "Gerade die erhöhten Gefahren des Seehandels haben schon in Byzantinischer Zeit zu assecuranzähnlicher Modifikation der Havereigrundsätze geführt."

[155] *Op. cit.*, pp. cclxi–cclxii.

> "In the Mediterranean, piracy, until a much later period than the date of the Sea Law, was the resource of the young, active and resolute among the sea-faring population. The merchant service was manned to a great extent by pirates who were getting too old for that honourable calling. There must always have been some danger that the temptation of a large booty would revive the habits of youth; it was the object of these provisions to offer a counterpoise to such temptation." [156]

We come next to the Basilica. In the IX Century considerable uncertainty arose as to the authorized sources of the law. This was brought about by the conflicting opinions of the VI Century jurists as to the proper interpretation to be given to Justinianean legislation, and from these opinions had developed a system of teaching that had deprived that legislation of all authority. The imperial judges eventually became quite puzzled to know by what rules of law to regulate their decisions.

Towards the close of the IX Century this matter was taken in hand, and under the direction of Basil I, the Macedonian, a code of forty books was drawn up, called, after him, the Basilica. At the beginning of the X Century his son, Leo the Philosopher, revised it and increased it to sixty books.[157] It is a very bulky code, and so it became better known in synopses and in encheiridia. In the history of maritime law the Basilica, in this revision, is of some importance. Its editors have treated of maritime law in one book, the fifty-third, which forms a code of commercial maritime legislation.[158] Its contents are known only in synopses. Excluding the sixth and seventh titles, which deal with fishers, fishing, rights in the sea, and the wine trade, the first five titles, as Mr. Ashburner has well shown, are simply a collection and re-arrangement of the maritime provisions found scattered in the Digest.[159] The Rhodian Sea Laws are sometimes given as an eighth title, but this would have led to a conflict occasionally, as its provisions do not always agree with those of the Digest. The Basilica would both be known and enforced in Italy, as we have seen, and, as the later book, it must have prevailed over the Rhodian Sea Law's principles while the authority of Constantinople still governed, although the customs to which the Sea Law bears witness would probably have existed, side by side with it, to be given legal effect when the cities could establish for themselves the rules that they wished to follow. To some extent the earlier Roman principles of the Basilica may have found a new foothold, and one can say this almost positively in the case of general average, where the later Italian statutes and codes follow as a rule the early strict Roman doctrine as to contribution.[160] "Nevertheless a commercial maritime law is being formed, little by little, distinct from the pure civil law and governed by a mass of peculiar rules." [161]

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[156] Ashburner, p. cclxii.

[157] Diehl, *Histoire de L'Emp. Byz.*, p. 118. "Basile I^{er} prit l'initiative . . . en faisant réunir dans le *Prochiros Nomos* (879) les principaux extrait du *Corpus juris civilis* et en faisant préparer, sous le nom d'*Épanagogè* (886), un manuel du droit usuel. Son fils Léon VI acheva l'œuvre en faisant rédiger, sous le titre de *Basiliques,* un code complet en soixante livres (887–893), compilation et résumé des travaux juridiques publiés sous le règne de Justinien."

[158] Desjardins, p. 17.

[159] Ashburner, pp. xcviii–cxii. "Book LIII of the Basilica does not contain any new law if we assume that the [Rhodian] Sea Law does not form part of it.

From the Later Roman Empire, therefore, the legal tradition passed to the western maritime cities, particularly to those of Italy,[162] which, in turn, passed it on to the rest of western Europe in the later years of the Middle Ages. And just as the Italian cities passed on their laws to western Europe when they were at, or just past, their prime, so, too, the Byzantine influence in Italy had diminished after the XI Century, when the later Empire was just past its prime and about to yield the ascendancy of the seas to the Italian republics.[163]

This withdrawal of the Empire left the Italian maritime cities free to make regulations for themselves or to adopt the general maritime customs, as they might choose, the latter appearing to have been the general case. Thus the maritime law tended to become a law *common* to all nations and peoples, a state of affairs out of which, by an analogous development, eventually grew, also, international law.

It is simply a mechanical *rifacimento* of those passages in the Digest and Code which seemed to its compilers to bear on nautical law." *Ib.*, pp. cxx–xi. "The Basilica reproduces in substance the definitions of the Digest."

[160] Ashburner, p. cclxxi, Desjardins, p. 21.

[161] Desjardins, p. 18. This statement, though Desjardins seems to make it with a wider reference, ought to be understood as applying correctly only to the Rhodian Sea Law.

[162] Goldschmidt., pp. 99–100. "An die Verkehrs- und Rechtszustände des byzantinschen Reichs knüpfen unmittelbar an Handel und Handelsrecht der zuerst wieder dem internationalen Verkehr zugewendeten Städte Italiens, insbesondere Amalfi's und Venedigs."

[163] Harrison, p. 24.

Using the words in the strictest Roman sense, therefore, as explained in the Preface, it will be proper to say that after the crumbling of the Empire the maritime and commercial law developed as a "Law common to all Nations." The principal element was, of course, the old Roman law, which, with the modifications set forth above, the Mediterranean seaports continued to follow, and which gave to all their laws a common substratum.[104]

[164] *Black Bk. of Adm.*, IV, p. cxxix.

CHAPTER II

EUROPEAN MEDIÆVAL MARITIME LAW: 1063–1500

The period which we are now about to consider is one of the most important in the history of the sea laws, for the old classical sea laws have been taken over as a general basis, although, as we have seen, they were already beginning to be modified by custom. On this basis the Middle Ages were to build up their own codes of law, sometimes modifying and sometimes abandoning the older rules. A new organization of society, giving rise to new conditions and therefore to new needs, had come into being and required the adaptation of the older system. The unity of which we have already spoken was still maintained and the adaptation was gradual, but this general similarity continued to be, as previously, the result of maritime conditions which were generally the same. It must be noted that the chief influence came from the Italian cities and spread throughout the western Mediterranean into the Atlantic and from thence into the Baltic. All through this period Italy occupied a very strategic position halfway between Constantinople and the East on one hand and between France, Champagne, the Rhine Valley, and western Europe generally on the other hand. This slowly disseminated influence itself made for uniformity, but we have something even more important than that to notice, for we are now about to behold the origin of many legal principles which flourish at the present day.[1] And so let us turn again to Italy.

In 1041 the Normans had conquered Apulia; Calabria in 1060; Sicily from 1061 to 1090. The cities fell somewhat later; Amalfi in 1131; Naples in 1138; and Gaëta about the same time, though the exact date is not known.[2] "There is no antecedent improbability," writes Sir Travers Twiss, "that the maritime cities, which formed part of the dominion of the Norman kings of Italy in the twelfth century, should have maintained amongst the vicissitudes of government which overtook them . . . their civil liberties and their maritime franchises."[3] In the preceding chapter we have already seen, as we shall further see below, that this was undoubtedly the case, and, furthermore, it is a fact that the Normans permitted the cities to continue to enjoy their municipal liberties.

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[1] Goldschmidt, p. 240. "Immerhin darf bei der Eigenthümlichkeit mittelalterlicher Rechtsbildung und Rechtsüberlieferung der Gedanke der Universalität nicht zu sehr gepreszt werden; wichtiger als der statistische Aufweis partikulärer Gleichförmigkeit ist die Auffindung ursprünglich vielleicht örtlich vereinzelter Keime späterhin vollentwickelter Rechtsgedanken."

[2] Sismondi, *Hist. Ital. Repubs.*, p. 43.

At the same time we have already seen how the content of the law was beginning to change to fit new conditions; changing, not by legislative or executive enactment, but by general custom. This principle is laid down in the compilation of the customs of Amalfi of the year 1010 A. D. "Lex est Sanctio sancta, bona tamen consuetudo est sanctio sanctior, et quod ubi consuetudo loquitur, lex omnis tacet,"[4] that is, a custom would override even the Civil Law, while Straccha, writing five centuries later, states that maritime customs must be followed unless to do so is particularly forbidden by the Civil Law, which implies that in an ordinary conflict Straccha would, even at that late date, expect the custom to prevail.[5]

The situation of the Italian cities, particularly those on the Adriatic, required changes to be made in the traditional Roman law rather earlier than by the cities much further to the west. The Slavonic invasion of Thrace and Illyria in the VIII and IX Centuries, and the raids of Norman and Saracen, led to piracy on a large scale, and made commerce much more hazardous.

For instance, this gave rise to a new rule of general average, departing from the rule of the Roman Law,[6] as we have seen in considering the compilation of the Rhodian Sea Law.[7] This new rule is followed in the Ordinances of Trani, in the third paragraph—"if the merchandise of the ship shall be plundered by cruizers the said merchandise so robbed is bound to be brought into average, and that should any of this merchandise escape, so that it is not plundered, all which has escaped is bound to contribute to make good that which has been plundered."[8] This is a good example of a customary variance under new conditions.[9]

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[3] *Black Bk. of Adm.,* IV, p. cxi.

[4] *Ib.,* IV, p. xciv.

[5] Straccha, *De Mercatura,* p. 170. "Denique duas sic subiungo regulas ad tractatum de nautis, navibus, et navigatione, utiles et necessarias, altera est nauticam consuetudinem praecipue spectandam esse, dummodo legi non adversetur, hoc est, a lege non reprobetur."

[6] Dig. XIV, 2, 2, 3. This provides that all should contribute to the ransom of the ship, but that as regards the cargo, each should bear his own loss. And see above p. 13.

[7] Above p. 38.

But in this period there was still another cause that made new regulations necessary. There was a tremendous increase in sea travel, due particularly to the great number of pilgrims to the Holy Land and to the Crusades, such as had not existed for many centuries before. All this made for an increase in commerce, as the pilgrims did a considerable amount of trading, and some way would have to have been found to finance the transport of the Crusaders, much of which was ultimately done on credit.[10]

Custom was added to custom, and as their number increased a new problem was presented. The memory of these new rules was preserved at first only by oral tradition, and this was at once a source of uncertainty and of controversy. Some written statement became necessary, and in this the first Italian maritime codes found their inception during the XI Century.[11]

> "It may seem strange to those who are not familiar with the ordinary groundwork of mediæval jurisprudence, to find so much greater weight attached to custom (consuetudo) after the breaking up of the Roman Empire, than to law (lex). Wherever the German tribes established themselves they brought with them their personal laws, but they allowed the conquered people to observe their own customs in matters not provided for by the law of the conquerors; but in many parts of Italy the German laws never seem to have prevailed; yet the old tie of nationality represented by the imperial law had become everywhere gradually relaxed, and a new bond of civic union aspired to take its place. This principle of civic union had its roots in the municipal institutions of Rome, which preserved their vitality long after the empire had fallen to pieces, and it was embodied in local customs, which were of paramount authority even if they should be in conflict with the ancient law." [12]

Hence, as we have seen above,[13] an established custom would override the Civil Law.

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[8] *Black Bk. of Adm.*, IV, p. 526–527. "Se la mercatantia dela nave fusse robata de corsari, sia tenuta la dicta mercatantia robbata de andare ad varea, et che se ne campasse de queste mercatantie, che non fosse robbate, tutte quelle che compasse sia tenute de emendare quella che fusse robbata."

[9] And see below p. 183.

[10] Goldschmidt, pp. 143–144, notes 3 and 4.

[11] *Black Bk. of Adm.*, IV, p. xciv. One reads of "customs" of Genoa of 1056; of Barcelona of 1068; of Pisa of 1081—these may or may not have been written. Goldschmidt, p. 151, n. 29.

[12] *Black Bk.. of Adm.*, IV, p. xciv.

[13] *Supra*, p. 43.

> "The eleventh century seems to have been a period when grave difficulties were experienced in many cities in keeping up the knowledge of their good customs by oral tradition, and when it was found necessary to appease the controversies, which arose amongst the citizens themselves on the subject of their customs, by reducing them into writing." [14]

But even with this varying of custom it must not be thought that there was a definite break anywhere. Rather was it a slow progression, a gradual development, or, as M. Desjardins has so aptly put it, another link in the chain. In the main, Justinian and Leo the Philosopher had governed the littoral until the Normans came.

However, the wars of Nicephorus with Otho, the Western Emperor, and with Ironhead, the Prince of Benevento, had wearied the people. The communities in southern Italy fell into such a state of isolation that they were more eager to obtain immunity from all taxation than protection for industry and property, so that the advantages of the Imperial administration ceased to be appreciated.[15] And thus there came the Normans and the battle of Montepulciano in 1042.[16]

> "When the Norman princes had succeeded in subjugating the southern provinces of Italy, they were careful, after establishing their political supremacy over the country, not to interfere with the civil autonomy of the more important maritime cities, but to allow them to continue to enjoy their municipal liberties, amongst which was the right of entering into mutual relations of commercial intercourse with other cities. This inter-communal freedom of municipal life was a legacy of Imperial Rome, and it existed on the shores of the Baltic equally as on the shores of the Mediterranean, at a period before any written records of mediæval legislation are discoverable." [17]

And as we have already seen [18] the cities preserved their forms of government and municipal privileges, indeed, "if credit may be given to the date [19] inserted in the text of the Ordinance of Trani (A. D. 1063) there were Consuls of the Sea in that city in the eleventh century, who were the representatives of an ancient municipal magistracy of the Roman period, of which traces are to be found in various parts of Italy, for instance at Amalphi, and also in the South of France in the twelfth century." [20]

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[14] *Black Bk. of Adm.*, IV, p. xciv.

[15] Finlay, II, p. 333.

[16] Desjardins, p. 25.

[17] *Black Bk. of Adm.*, IV, pp. cx–cxi.

[18] *Supra*, p. 43.

[19] See below, p. 46, n. 25.

[20] *Black Bk. of Adm.*, IV, p. xci. Goldschmidt, p. 164, n. 68, thinks this "completely improbable," and the present author agrees. The Pisan Consuls of the

"Trani," further writes Sir Travers Twiss, "occupied a position in the van of the maritime cities on the Adriatic coast in the eleventh century. The Normans had succeeded in expelling the Greeks from Trani in A. D. 1043. Such an event would probably entail some reform of her maritime laws, and some reorganization of her maritime tribunals;[21] and as henceforth the commerce of Trani would be more than ever exposed to be plundered by the corsairs of the Greek and Illyrian coasts, and from her increasing commerce with the Levant would become also more exposed to Saracen corsairs, it is intelligible that she should have taken an early opportunity to repudiate the rule of the Roman law,[22] and to declare all losses from Corsairs to be matters of general average."[23]

It has also been suggested that the earliest Sea Laws of Trani, Amalfi, Venice, and Ancona may be really the statutes of gilds, but the learned author who advances this theory does so only with doubt, and in view of what is known today as to the origin and development of the gilds, the present author does not consider this theory at all possible.[24]

"The most ancient extant sources of Modern Maritime Law are the Decisions of the Consuls of the Sea of the city of Trani on the shores of the Adriatic Gulf. They purport to be of the date of A. D. 1063,[25] and in

Sea are certainly the first of whom we have any accurate records. Those of Trani may have been inserted into the code during a later compilation—this would not affect the general antiquity of the legal provisions of the code.

[21] But why? This does not seem at all probable. Cf. above pp. 43 and 45, where the learned author says the direct contrary of what he observes here. The evidence indicates that this change in the rule of contribution was a general and *customary* one at this time throughout the Mediterranean—see above p. 38.

[22] *Supra*, p. 13.

[23] *Black Bk. of Adm.*, IV, p. cxxviii.

[24] Goldschmidt, p. 168.

[25] Elsewhere Sir Travers Twiss takes positive ground in favor of the authenticity of this date—*Black Bk. of Adm.*, IV, p. cxxviii; "The concurring circumstances in the history of Trani are not hostile to the date of A. D. 1063." See also the full discussion, *Ib.*, IV, pp. cxii–cxxxii, in which he concludes in favor of the 1063 date. *Ib.*, IV, p. xv, "The Ordinances of Trani, which bear indeed a Latin title, but are drawn up in Italian, are far more interesting as regards their contents than the Amalphitan Table, and they are not less perplexing as regards their origin. If the date of A. D. 1063 be correct, they are the most ancient body of mediæval maritime laws, which have come down to our time and of which the date is declared on the face of them, being a century earlier than the maritime constitutions of Pisa (A. D. 1160), or the maritime assizes of King Amauri I of Jerusalem (A. D. 1162–73). On the other hand there is no historical necessity for rejecting the date (A. D. 1063) of the Ordinances of Trani on the ground, that it is inconsistent with all probability, that any mari-

the printed volume of the Statutes of Fermo,[26] in which they have been handed down to us they are entitled 'Ordinamenta et Consuetudo Maris, edita per Consules Civitatis Trani.' These so-styled ordinances and custom [sic] are, however, a series of decisions made after deliberation by the Consuls of the Corporation of Navigators at Trani as being the best instructed persons in maritime matters, who could be found in the Adriatic Gulf. The next most ancient extant source are the Judgments of Oleron. . . .[27]

"The reader may probably not be familiar with the Decisions of Trani. The town of Trani is situated on the shores of the Adriatic, and formerly belonged to the kingdom of the Two Sicilies, whereas Fermo, which is also a port on the Adriatic, lying to the north of Trani, is within the

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time customs should have been reduced into writing at so early a period, for in the case of Pisa, although no written maritime laws of that city have been preserved of an earlier origin than the Constitutum Usûs (A. D. 1160), a record of the existence of such laws has been preserved in a Diploma of the Emperor Henry IV, which is kept in the Archives of that city and is of the date of A. D. 1081, in which the Emperor undertakes to observe the maritime constitutions of the Pisans: 'Constitutiones, [should be 'consuetudines,' see Goldschmidt, p. 157, n. 47] quas habent de mari, sic eis observabimus, sicut illorum est consuetudo.' It is hardly necessary to observe that the term Constitutions, which is used in this Diploma, implies that the maritime customs in question had been formally reduced into writing." But this suggestion, one must confess, is based on a misreading of the text. M. Pardessus agrees in this date, Desjardins, p. 25, as does M. Desjardins himself—"Le statut date, à nos yeux, de 1063, et son ancienneté même en rehausse l'importance. Un quart de siècle plus tôt, avant l'invasion normande, ce littoral de l'Adriatique était encore gouverné par les codes de Justinien et de Léon le Philosophe. Les deux législations se relient l'une à l'autre sans qu'un anneau de la chaîne ait été rompu." German authority is inclined to doubt this date. Schaube, p. 277, rejects it, Goldschmidt dates it at 1363 (p. 178—"das vermuthlich erst dem 14. Jahrh. (1363?) angehörige Seerecht von Trani)," and Wagner, pp. 61–62, will not accept the traditional date—"*Ordinamenta . . . Trani.* Die angegebene Entstehungszeit [1063] des (lateinischen) Originals muss aus verschiedenen Gründen bezweifelt werden." But it should always be remembered that "the date at which a statute received its present shape is not necessarily the date of the law which it contains," Ashburner, p. cxv. Goldschmidt severely criticizes the views of Desjardins as to the dates of the various sea laws, p. 335, n. 1.— "Eine chronologisch geordnete Uebersicht der Seerechtsquellen hat neuerdings versucht *A. Desjardins* . . . aber nicht allein ist das Datum der einzelnen Quellen vielfach unsicher, z. B. für die Seerechte von Trani und Amalfi, für den Grundstock des *Consolat's*, sondern es kann auch die der zeit nach jüngere Quelle viel älteres Recht enthalten als die früher aufgezeichnete, z. B. eine skandinavische des 13. Jahrhunderts' älteres Recht als das *constitutum usus* von Pisa; endlich dürfen die besonders wichtigen Abstammungsverhältnisse nicht, wie geschahen, ignorirt werden."

[26] Desjardins, p. 25. "La ville de Trani . . . parvint, vers cette époque, à la plus haute prospérité commerciale et sa déchéance ne commença qu'au treizième siècle. Son statut, publié deux fois, en 1507 et en 1789, à la suite du statut de Fermo, sous ce titre: *Ordinamenta et consuetudo maris edita per consules civitatis Trani,* débute ainsi: 'Al nome de lo omnipotente Dio, Amen. Millesimo sexagessimo tertio'."

[27] *Sed quaere*—the Tabula Amalphitana, the Pisan Constitutum Usus, etc.

limits of the March of Ancona, which belonged formerly to the See of Rome. The archives of Trani were unfortunately burnt in 1799, when a French army occupied the town . . . the preservation of these decisions is due to the accidental circumstance that they are printed at the end of the Statutes of Fermo. . . . Fortunately the Decisions carry with them the means of verifying their date in the opening clause, which announces that they were drawn up in the year 1063 in the first indiction; and on examination it has been found that the first indiction corresponds with the year of our Lord 1063. . . .

"The Decisions of Trani consist of thirty-two propositions, the first of which commences with the words,[28] 'The Consuls propose, determine, and decide with regard to the question of the act of the sea herein-after written, that when a ship is cast away on land by misfortune and the stern separates from the bow, the merchandise on board the ship shall not contribute to the loss; but if the stern does not separate from the bow, the merchandise on board shall contribute to the repair of the ship' . . .

"This decision is partly in accordance with the law of the Digest (l. xiv. t. II), and is partly a deviation from it. The Roman law, in both the cases mentioned in the above decision, left the owner of the ship to bear his own loss without any claim of contribution against the owners of the cargo; whereas the modern law, in the second case, where the ship was not cast away but only damaged, gave the owner of the ship a right to call upon the owners of the cargo to contribute to the repairs. The reason of this distinction is perfectly intelligible. Where the ship had been cast away she could no longer be of service to the owners of the cargo, but where she was only damaged she might be repaired, and in that case might complete her contract with the owners of the cargo by carrying it forward to its destination. Several other rules will be found to be laid down in these decisions, which are deviations from the Roman law, and mark a new epoch in Maritime Law; but the cardinal point of distinction between the ancient and modern systems of Maritime Law is that the mariner under the modern system is a free man. The slave no longer figures as a chattel, which may be thrown overboard to lighten the ship. The crew are free men. The Decisions of Trani lay it down that the mariners are bound to remain by a stranded ship eight days in order to save its equipments, after which time they may quit it;[29] that for certain faults only a mariner may be discharged from the ship,[30] that a mariner can only quit the service of the ship during her voyage under certain circumstances, and on forfeiting half his wages.[31] Other provisions will be found in these decisions which appertain to a new system of law, and were subsequently more fully developed in the Judgments

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[28] *Black Bk. of Adm.*, IV, p. 525.

[29] Art. I, *Black Bk. of Adm.*, IV, p. 525.

[30] Art. IX, *Ib.*, pp. 529–531—for blaspheming God, for being quarrelsome, for being a thief, for debauchery.

[31] Arts. XI and XII, *ib.*, p. 531—the reasons were, promotion to be a master or mate, or a vow to go on a pilgrimage to St. James, the Holy Sepulchre, or Rome.

> of the Sea and in the Consulate of the Sea, such for instance as the provision that the master of the ship may not strike a mariner, and that the mariner may defend himself if the master pursues him and persists in striking him.[32] (The Decisions of Trani . . . contemplate a state of maritime navigation in which a bench of oars was still a part of the equipment of a ship, as the mariner was required to retire from the prow of the ship behind the bench of oars, beyond which if the master pursued him he was at liberty to defend himself) ; also that the master of a ship may hypothecate the ship to repair her after a tempest, or to ransom her from corsairs.[33] There is no provision amongst these Decisions which lays them open to the suspicion of forgery." [34]

M. Desjardins, also, comments on the clarity of the style of these articles, and the practical spirit in which they are conceived, and thinks practically none of them devoid of interest.[35] He notes Article V, which provides that where a boat has made sail and returns to port *by chance* [36] (in Desjardins, *because of an accident*), if the merchants demand back their goods the ship is nevertheless entitled to the freight. Articles IX and XXXI, on which we have just commented, are also mentioned in connection with Article V, as among provisions coming neither from the Roman law nor the Basilica. "The theory of contribution, scattered in many articles, has manifestly undergone the influence of the pretended Rhodian Sea Law." He sees, finally, the influence of the customs that will prevail in the Roles of Oléron.

Probably the next code in point of time is that of Amalphi, as it is given in most books, or Amalfi, as the inhabitants spell it today.

We have already seen that Amalfi was a place of importance in the VII, VIII, and IX Centuries,[37] that it was also a considerable naval power, and that it kept up relations with the Empire at Constantinople.

> "In the tenth and next following century the Amalphitans took a decided lead in forming commercial establishments in the cities of the Levant, which had passed under the Mahommedan rule. They had succeeded in the early part of the tenth century in establishing their factories in the chief cities of Sicily, and they had a special quarter assigned to them in

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[32] Art. XXVIII, *ib.*, p. 541—he may defend himself even to the extent of killing the master.

[33] Art. XXI, *ib.*, p. 543.

[34] *Ib.*, II, pp. xliii–xlvi.

[35] Desjardins, pp. 25–26.

[36] *Black Bk. of Adm.*, IV, p. 526—"per caso." The English translation is not accurate as given on p. 527 of the *Black Book.*

[37] *Supra*, pp. 31–34.

Palermo, known as the Amalphitan quarter. Thence they appear to have extended their commerce to Alexandria, and through the favour of the Caliphs of Egypt they obtained from the Governor of Jerusalem in A. D. 1020 permission to build a church in that city, adjoining to which they erected a hospital,[38] and dedicated it to St. John the Baptist." [39]

In the long twilight of the authority of the Roman Empire in Italy, a period called by most historians the Dark Ages, the names and form of the Roman municipal government were almost universally preserved.[40] It has been mentioned above [41] that during the period of the Later Empire the magistrates of Amalfi were appointed by the Exarch, but after the decline of the Exarchate the city appears to have been governed in a republican way by magistrates of its own election.[42] The legend of the capture by the Pisans from Amalfi of the famous copy of the Pandects of Justinian in 1135 points to a general belief that Amalfi had preserved its relations with Constantinople and had kept up in its courts the principles of the old jurisprudence.[43]

There is a tradition of Amalfitan maritime laws having been published in 954,[44] and there is extant a collection of Amalfitan customs, from which we have quoted,[45] which claims to date from 1010, when it was reduced to writing from the memory of the best informed citizens.[46] The oldest manuscript, dating from 1274, states that it is a revision of the laws of 1010.

"It would thus appear that the historical antecedents of Amalphi are not unfavourable to the supposition that the city had maritime laws of its own in the tenth century[47] . . . there is no antecedent improbability that . . . a [maritime] court existed in the tenth century, over which Consuls of the Sea may have presided; but the institution of Admiralty Courts belongs to a somewhat later period.

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[38] The origin of the Knights Hospitallers and thus of the later Knights of Malta.

[39] *Black Bk. of Adm.*, IV, pp. ix–x.

[40] *Ib.*, IV, pp. xciv–xcv.—"the magisterial office of Consul, either from its associations with the history of Rome before the Cæsars, or from its ready adaptability to any form of municipal institutions, found a welcome reception in the great commercial cities on the shores of the Baltic equally as on the shores of the Mediterranean Sea during the course of the twelfth and thirteenth centuries . . . the consular form of municipal government, which may have been an unbroken tradition in many of the Italian municipalities, appears to have come almost universally into use in the south of France in the course of the twelfth century."

[41] *Supra*, p. 31.

[42] *Back Bk. of Adm.*, IV, p. ix.

[43] *Ib.*, IV, p. x. Holdsworth, *H.E.L.*, II, p. 111, n. 4.

[44] *Black Bk. of Adm.*, IV, p. xi.

[45] *Supra*, p. 43.

[46] *Black Bk. of Adm.*, III, p. lxiii.

"That certain rules of that Court should have been committed to writing in the tenth and eleventh centuries for the guidance of the Consuls of the Amalphitan factories first of all in Sicily, and subsequently in the Levant, is also a reasonable assumption."[48]

The Tabula Amalfitana consists of sixty-six articles, of which twenty-one are in Latin, and forty-five in Italian, interspersed with one another, some of the articles containing mixed Italian and Latin words. Ashburner dates the Latin articles before 1131, but thinks the Italian chapters probably not earlier than the middle of the XIV Century.[49]

Sir Travers Twiss thinks that the bilingualty of the document would not prevent its being referred to a period as early as the XI Century,[50] but he states that both Italian and German critics agree in considering the Latin chapters earlier than the Italian chapters. With this general opinion M. Desjardins agrees.[51] But as the general maritime conditions during this period were quite stable, and as the laws may be much older than their codification, perhaps the Italian chapters may also claim an equal antiquity. As Mr. Ashburner says, "The date at which a statute received its present shape is not necessarily the date of the law which it contains; and the form of a commercial document may easily be centuries older than the document itself. So long as the conditions which make the law remain unaltered, the law itself remains unaltered. Between the ninth and the thirteenth centuries there was probably less change in the conditions of commerce and navigation than there has been in the last twenty-five years."[52] It follows, therefore, that the statutes may be considerably older than the written forms in which we find them. In fact, Sir Travers Twiss is doubtful whether much maritime law was written before the XII Century, especially as the law of the sea was generally proved in the western Mediterranean by the oral testimony of experts.

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[47] *Black Bk. of Adm.*, IV, p. xi.

[48] *Ib.*, IV, pp. xiii–xiv.

[49] Ashburner, p. cxx. And see Wagner, pp. 62–63. Goldschmidt dates the Latin in the XIII, the Italian in the XIV Century, p. 178. "In dem Seerecht von *Amalfi* finden sich, sowohl in dem älteren lateinischen, vermuthlich dem 13. Jahrh. angehörigen Theil, c. 12, 13, wie in dem jüngeren, sicher erst dem 14. Jahrh. angehörigen italienischen Theil, c. 34, 39, 40, 46."

[50] *Black Bk. of Adm.*, III, p. lxv; ib., IV, p. cxxvii.

[51] Desjardins, p. 27.

[52] Ashburner, p. cxv. *Black Bk. of Adm.*, IV, p. li, "There is no reason to believe that a MS. exists of any famous mediæval Sea-Laws, which is contemporaneous with their first reduction into writing."

> "Various causes combined to account for the decisions of the maritime tribunals not being reduced into writing before the twelfth century. In the first place, the subject matter of maritime disputes was foreign to the learning of ecclesiastics, and there is reason to believe that the proceedings in maritime questions were carried on at an earlier period in a tongue (lingua franca) which was not familiar to the clergy, nor identical with the languages of the documents which they were accustomed to draw up. But by degrees, as disputes in maritime matters multiplied with the increase of maritime commerce, the want of a written record of such decisions was felt, and after the Crusades had contributed to familiarise the clergy with the habits of sea-faring men, and incidentally with the customs of the sea, clerks were readily found able to reduce into writing the decisions of the maritime tribunals and to record them in Rolls, so that if on occasions persons qualified by experience to attest the custom of the sea were not at hand, the record of a previous judgment in point might be available to guide the conscience of the prud'hommes in advising the judge, and to assist the judge in maintaining an uniformity of decision." [53]

With the learned author's further statement [54] that the earliest sources of the maritime law were drawn up in the form of decisions and judgments, and that the compilation of customs came later, one cannot but disagree, unless one looks solely to the titles of the various manuscripts and not to the situation that caused their composition. Mr. Ashburner also disagrees most strongly,[55] and after citing a number of authorities, a number of whom we have already examined, he continues: "These authorities, which might be largely added to, clearly point to the existence, if not of a general sea custom for the whole Mediterranean, at least of a custom extending beyond the jurisdiction of the individual state."

"The existence of such a sea custom is suggested by two other circumstances, (1) the constant borrowings by one statute from another, (2) the absence of enactments providing for conflicts of jurisdiction."

[53] *Black Bk. of Adm.*, II, p. xli.

[54] *Ib.*, p. xliii.

[55] Ashburner, p. cxxiii.

In Desjardins is to be found a good synopsis of the important provisions of the Table.[56] There are a number of articles that deal with the engagement and the wages of the sailors,[57] with the barratry of the seamen,[58] with the joint ownership of vessels and with the *columna comunis,*[59] with consort between a number of vessels,[60] with the powers and the duties of the master,[61] with the privileges which encumber the vessel,[62] with the execution of the contract of affreightment,[63] with jettison and the division of contribution between the ship and the capital (*columna*) engaged in the voyage.[64]

These two collections of the laws of Amalfi and of Trani have been given at some length as characteristic of the early principles of the maritime law,[65] and as being themselves probably the earliest mediæval codes.

There were many other fairly early collections, such as the following, of whose genuineness Mr. Ashburner is confident and whose date is determined: [66]

1156–1160 Constitutum Usus (Pisa)
1214 Curzola (earliest part)
1227 Ziani (Venetian)
1229–1236 Tiepolo (Venetian)
1255 Zeno (Venetian) and Marseilles, also
1258 Barcelona
1272 Ragusa and Tortosa

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[56] Desjardins, pp. 27–28.

[57] *Ib.*, p. 27. *Vide Black Bk. of Adm.*, IV, pp. 2–51. Arts. I, II, XIII–XVI, XXVI–XXVIII, LI–LIII, LVI–LVIII.

[58] Art. III.

[59] Arts. IV, VI, VIII, XI, XII, XXIV, XXXIII, XXXV, XXXVI, XLVI. The "column" was a common fund made up by all the merchants who were associated for the voyage with the ship in a joint adventure.

[60] Art. XXXVIII. In such a case there is contribution between the various vessels in case of loss or capture by pirates.

[61] Arts. VII, X, XIX, XXIII, XXVII, XXIX, XXXII, XXXIX.

[62] Art. LXI.

[63] Art. LIX.

[64] Arts. XLVII, XLVIII, XLIX, LIV, LV.

[65] As late as the XVII Century the laws of Amalfi were recognized in South Italy, Mitchell, p. 5. Wagner, *Seerecht,* p. 37, note 7: "Rechtsquellen, zunächst bestimmt für einen beschränkten Bezirk, finden, anfangs langsam, dann immer mehr um sich greifend, weitere Verbreitung und verdrängen die früheren Rechtsdenkmäler zum Theil gänzlich, so namentlich im Süden, wo sich diese Entwicklung übrigens erst im 17. Jahrhundert abschliesst,—noch 1604 war die Tabula Amalphitana in Süditalien in Geltung, dagegen nicht mehr 1642."

[66] Ashburner, pp. cxix–cxx.

1298 Breve Curiæ Maris (Pisa)
1312 Spalato
1313–1344 Officium Gazarie (Genoa)
1331 Phara (Lesina)
1345 Consolatum Trapani

The Statutes of Cattaro, Pera, and Zara [67] belong to the early XIV Century; Ancona, perhaps to the middle, and the Consulate of the Sea to the end of that century, but these are only the dates at which the statutes assumed their present form, for many of them contain large masses of earlier material.

> "The Statutes fall into two groups: (1) Some of them, e. g. the maritime statutes of Ancona, the Constitutum Usus of Pisa, present a complete theory of the law of general average contribution. (2) Others again, e. g. Ragusa, Venice, Zara, Spalato, only deal with isolated points in the law. They presuppose a custom—*consuetudo* or *usus* (St. Zara, IV, 75; St. Spalato, VI, 46; St. Tiep. A 35)—by which the cases are governed, and the statutes merely intervene where there is a dispute as to the terms of the custom—'ut omne prorsus litigium tollatur,' St. Zara, IV, 55—or where it is found necessary to modify it." [68]

There are two XII Century statutes which must here be mentioned briefly: the Old Statutes of Pisa and the Assizes of Jerusalem.

Pisa and Genoa were the two great city states of Liguria, and each was of great antiquity. As early as the IX Century they possessed considerable war fleets and fought the Saracens, and in the XI Century we find their citizens scattered throughout the Mediterranean—among the lesser islands, in Sardinia, and off Africa. And just as Pisa triumphed over Amalfi in 1135 we find Genoa winning predominance over Pisa in the sea fight of Meloria in 1284 and by the destruction of Porto Pisano in 1290.[69]

> "There is trustworthy evidence that the Pisans had maritime laws drawn up in writing in the middle of the eleventh century, as the Emperor Henry IV undertook to maintain them in a charter, which he granted to the Pisans in A. D. 1081,[70] and there is also evidence that magistrates existed at Pisa in the twelfth century under the title of 'Consules Maris.'" [71]

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[67] Goldschmidt, p. 168. They contain both civil statutes and commercial law, especially Sea Laws.

[68] Ashburner, p. cclxviii.

[69] Goldschmidt, pp. 146–147.

[70] See n. 25, pp. 46–47 above. It is given in Muratori, *Antiq.*, IV, Vol. 19.

[71] *Black Bk. of Adm.*, IV, p. cxxvii. Desjardins, pp. 28–29. Cf. Wagner, pp. 63–64.

The Old Statutes were composed of two distinct parts, the first being the Constitutum Legis, containing forty-nine chapters, and the second being the Constitutum Usus, also having forty-nine chapters. This contrast between the *lex* or the edict, and custom, is very interesting, for it is a fundamental difference as regards the origin of the laws contained in each code. The former is fundamentally Roman and Lombard: the latter is truly customary.[72] The history of these documents sheds a very interesting and characteristic light on the history of the whole period.

During several centuries there was a great borrowing and revising of laws in each city,[73] and a number of the cities appointed standing committees of revisors to keep the laws up to date from year to year. Of this process Mr. Ashburner gives an excellent account, choosing Pisa as his example.

> "The revisors sometimes give us in the preface to their work an account of the principles upon which they proceeded. It is enough to cite that given by the revisors of the Constitutum Usus, the most undoubtedly ancient and perhaps the most important of all mediæval statutes.
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> "The city of Pisa, according to the Prologue . . . had its unwritten customs by the side of the lex, a mixture of Roman and Lombard law. Previsores were appointed yearly to judge of matters of custom. As there was great diversity in these judgments, the Pisans determined to write down their customs. In 1156 they elected for the first time sages,

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[72] Goldschmidt, p. 151, n. 29. This same contrast is to be found in Pistoia.

[73] *Black Bk. of Adm.*, III, pp. lxxx–lxxxi. "The usages of maritime commerce, although they have been reduced into writing at very different epochs in different countries, exhibit a striking identity of character, which contrasts singularly with the great diversity, which is to be observed in the civil institutions of these countries. Two principal causes may have operated to bring about this result. In the first place the circumstances which gave rise to those usages were nearly identical in every country, and it was the interest of each country to be just in such matters, in order to secure reciprocity for its merchants and mariners in other countries. In the second place, at the time when the enterprises of the Italian Republics in the South and of the Hanse Confederation in the North were indirectly co-operating to bring about a great commercial revolution in Europe, merchants and mariners were left at liberty to set laws to themselves, and the usages of one locality were readily adopted by another, as soon as the superior convenience and equity of them were recognized." Holdsworth, *H.E.L.*, V. p. 100. 'In the earlier Middle Ages maritime law was more cosmopolitan in its character than commercial law. . . . In the first place, the problems which a body of maritime law must solve are in all ages very similar. . . . These facts tend to produce a similarity of rule because it is easy for one port to imitate the customs of another port. They tend also to make a codified set of rules convenient because they enable the foreign merchant to understand his legal position."

called *constitutores,* whose duty it was to correct what had to be corrected, to separate matters of custom from matters of law, and to commit the whole to writing. This committee was continued by yearly appointments—no doubt with alterations in the personnel—till the work was finished. They had from time to time published separate provisions made by them; but the Constitutum Usus was not published as a whole till 1160.[74] No other written Constitutum de usibus was to have any force thereafter except as regards past acts. The Constitutum Usus must have been well arranged at first, but it was frequently revised in the course of the hundred and fifty years which followed its creation, and, as it now stands, it reads like an English textbook which has been through the hands of half a dozen editors." [75]

These formerly unwritten customs of Pisa, as they had been accepted from time to time by the annually elected magistrates called *provisores,* whose duty it was to do justice on principles of natural equity in all new cases arising between Pisan citizens and between Pisan and foreign merchants, and whose diverse judgments had given rise to this new statement of the law, were divided into two parts.

The first part became the Constitutum Legis and contained the modifications and amendments of the original Lex Romana and the traditions of the Lex Longobarda,[76] by which the city had formerly been governed; the second contained the customs and usages on the subjects for which the written laws had not provided, and this was called the Constitutum Usus.[77]

Four of the rubrics of the Constitutum Usus treat of maritime loans and of the early form of the commenda, rubrics 24, 25, 26, 27, of which we shall later speak. The great importance of Pisa for our purposes lies in the facts that the consuls of the sea first appear there, and that its maritime court is the second earliest that we know,[78] being the model copied in the Spanish peninsula and thereafter by the maritime states of the Atlantic. It was probably erected into a municipal court in the summer of 1200.[79] The maritime courts were not as old as the gild courts, of which we shall speak in the next chapter, but they came to exist side by side with them, and sometimes their jurisdiction was very considerable indeed. The Pisan maritime court was, in its origin, a court of the Pisan maritime gild.[80] For us it is particularly interesting to note that the erection of the Pisan court, or the granting to it of public powers, took place under circumstances very like those in England somewhat more than a century later, and was due to the same cause.[81] We have already commented upon the close connection in early law between piracy and sea borne commerce, and this connection lasted until well into the Middle Ages.[82] Like their English brethren, the Pisans were quite frankly what our more squeamish age would call pirates, and their large merchants thought of piracy merely from the point of view of business men seeking a lucrative enterprise.[83] But this point of view had its disadvantages, if not for the people immediately concerned, at least for their fellow-citizens, through the system of reprisals, of which we shall treat in the next chapter. Like the English kings, the city of Pisa became tired of incessant troubles with its neighbors and of seeing its trade decline because of the other cities' reprisals, and the maritime court was created to deal with such and other disputes. We find the court exercising a general jurisdiction about 1215–1217.[84] The Pisan *curia maris* could take cognizance of all maritime matters, of disputes relating to freights and consignments, loans and commercial documents connected with maritime affairs, profits, losses, average, wages, and of merchants, shipbuilders, carpenters, caulkers, sail-makers, rope-makers, oakum workers, joiners, chest-makers, painters, coopers, potters, and saddlers. Doubtless the court had jurisdiction over some of these trades only when they were concerned in maritime matters, for the test of the court's jurisdiction came to be based, like the modern American admiralty jurisdiction, on the nature of the cause rather than on the status or trade of the individual.[85] The court was presided over by the *consules maris* like any of the similar commercial courts of the gilds.

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[74] The prologue of the Constitutum Usus shows the great age of the numerous, edited, annually revised customs, as well as their origin in international commerce—"tam civibus et advenis et peregrinis et omnibus universaliter in consuetudinibus previderent;—consuetudines suas, quas propter conversationem, quam cum diversis gentibus habuerunt—in scriptis statuerunt redigendas."

[75] Ashburner, pp. cxxi–cxxii.

[76] Goldschmidt, p. 150, n. 26.

[77] *Black Bk. of Adm.,* III, pp. xxix–xxx. According to Goldschmidt, p. 335, this was the chief source of the Statutes of Marseille, "Insbesondere ist das Pisanische *constitutum usus* eine Hauptquelle des Marseiller Statuts 1255."

[78] Mitchell, p. 48. "The Pisan court is of earlier date than any similar institution that existed elsewhere."

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[79] Mitchell, p. 49. Schaube, p. 14. Goldschmidt, p. 177. "Die in zahlreichen Städten des Mittelmeeres begegnenden *consulatus maris* [als allgemeine, sogar schon im 12. Jahrh. begegnende Institution der Mittelmeerstaaten werden die Seegerichte gemeinhin bezeichnet] tragen einen sehr verschiedenen Charakter. In Pisa, wo sie spätestens seit Beginn des 13. Jahrh.'s nachweisbar sind, wird so genannt die oberste Administrativ- und Gerichtsbehörde der besonderen Seehandelsgilde, mit sehr ausgedehnter Gerichtskompetenz." Goldschmidt, p. 167, n. 81, accepts the *privilegia curia maris* as dating from either 1214–1216 or 1227–1228. Cf. Schaube, pp. 15–16.

[80] Desjardins, p. 39. Schaube, pp. 1–3.

[81] Schaube, pp. 4–8, 11–14, 285.

[82] Goldschmidt, p. 27. "Seeraub, welcher bis tief in das Mittelalter hinein mit dem Seehandel eng verbunden ist."

[83] Schaube, p. 38. "Waren doch auch Seekrieg und Seehandel damals nicht so verschiedene Sphären, wie sie uns heute erscheinen; Seekrieg und Seeraub fasste man nicht zuletzt vom Standpunkt des Geschäftsmans als gewinnbringende Unternehmungen auf, und der friedliche Seehandel musste jeden Augenblick zu eigenem Schutz die Waffen zu führen bereit sein."

[84] *Ib.*, p. 127.

At a little before this time there is to be found in a treaty of peace of 1176 between Pisa and Genoa [86] the first mention of the travelling consuls, who were elected in each convoy of ships and who exercised a maritime and commercial jurisdiction when the fleet was away from home. In 1125 the Venetians had obtained the privilege of establishing in the kingdom of Jerusalem consuls charged with the duty of protecting their commerce and entitled to exercise a proper jurisdiction as well.[87] In Pisa the consuls resident abroad were a branch of the main Sea Consulate, and were elected by the Consuls of the Sea and their small council.[88] Charter-parties [89] were in use in Pisa in 1263; contracts of affreightment [90] in the same year also.

In the eastern Mediterranean the island of Cyprus formed part of the Later Empire, and was governed by dukes sent out from Constantinople. It was a separate Theme. When Isaac Comnenus revolted in 1182 it was detached from the Empire, only to fall into the hands of Richard Cœur de Lion in 1191, who gave it the following year to Guy de Lusignan, the first of the Latin kings of Cyprus. "Under that king the 'Assizes de Jerusalem,' [91] were introduced into

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[85] Mitchell, pp. 45–48. In Pisa it also had cognizance of the security that those engaged in banking were required to give, Goldschmidt, p. 162, n. 62.

[86] Goldschmidt, p. 182, n. 145. "Teneantur eligere duos bonos viros et utiles qui vadant in navibus ad unam provinciam ad quam vadunt causa negociandi qui teneantur sicut superiores (the previously elected arbitrators) donec in eo itinere fuerint (to decide)."

[87] Desjardins, p. 39.

[88] Schaube, p. 155.

[89] Goldschmidt, p. 322, n. 89.

[90] *Ib.*, p. 182, n. 144.

[91] *Black Bk. of Adm.*, IV, p. xcvi. "There is much reason to believe that the initiative of creating a Royal court of the Sea, with a coercive jurisdiction in maritime matters and a procedure of its own, rests with King Amauri I,

Cyprus as the Maritime Law of the Latin population, whilst the Greek inhabitants were allowed to live under the Maritime Laws of the Basilica and of the compilation known as the Maritime Law of the Rhodians."[92] The *livre des assizes de la cour des bourgeois* was edited in Jerusalem in 1187 and contains both commercial and maritime law. It is a peculiar mixture of Roman, Frankish, and South European law, and was also followed in Antioch and in Armenia.[93]

When we come to the Rolls of Oléron we have before us a code of which we can say definitely that it looks more toward the present than toward the classical days, and so, although the Rolls fall well within this period, it might be well to survey the development of the maritime law of the Mediterranean at this time briefly before we pass on to the Northern codes.

In maritime matters the law that had once been administered in the Mediterranean was derived from the Roman Civil Law, from the Basilica and from the so-called Rhodian Sea Law. This basis of law was the trunk from which sprang forth the new shoots of the Italian cities and of southern Europe. Custom was, as we have seen in many passages, the first great modifier. There are constant references to *usus* and *consuetudo* in the early maritime statutes,[94] and with the Roman and Basilican laws as a basis, modified by the newer mediæval maritime customs, a wholly new system of maritime law had begun to emerge.

Mr. Ashburner has made a most excellent detailed[95] comparison between the provisions of the classical laws and the provisions of the Italian mediæval codes of the XII and XIII Centuries and he has shown how the latter were built up with the laws of Justinian and the later Empire as a core.

From Italy the codified Sea Law spread to the south of France, and the Pisan *constitutum usus* is the chief source of the statutes of Marseilles of 1255,[96] which treat of such matters as the *commenda,* voyages in convoy, bottomry, jettison, the transport of pilgrims, and

who reigned over the Latin Kingdom of Jerusalem from A. D. 1162 to A. D. 1173." See also *ib.*, pp. xcvii–cvii, and for the text of the Assizes, *ib.*, pp. 497–519. For the court see Goldschmidt, p. 179.

[92] *Black Bk. of Adm.*, III, p. lvi.

[93] Goldschmidt, p. 191.

[94] Ashburner, pp. cxxii–cxxv.

[95] *Ib.*, pp. cxxix–ccxciii.

[96] Goldschmidt, p. 335. Desjardins, pp. 49–50, gives a short synopsis.

goods loaded on the deck, besides most of the subjects usual in such codes at that time. Many of these legal principles had come from Pisa, among them the *commenda*, bottomry, bills of lading and of exchange.[97] Montpellier had its customs and *établissements*, dating from the XIII Century,[98] and the Sea Consulate, at first administrative in its functions, rather than judicial, its consuls being city officials, appeared in that city in 1250,[99] probably from Italy (though there may have been an independent origin), and from thence it passed over to Spain.[100] It is particularly noteworthy that, like Pisa and later England, the first duties of the consuls outside the administrative field, were to suppress piracy.[101] One reads of a translation of Roman Sea Law in 1255, made at the command of St. Louis, and called *Li Livres de Jostice et Plet*,[102] which bears witness to the increasing study of the Roman Law. The Digest's title *Nautae, caupones*, has become *De noteniers, de taverniers et hosteliers, commant il sunt tenu des choses qu'ils reçoivent*. But "this morsel of juridical literature has had no influence on the development of French maritime law." [103]

At a little later period France possessed a general code drawn up for the use of the French Admiral and dating from 1373.[104] This code dealt with the jurisdiction of the French Admiralty, with piracy, with prize and with the Admiral's droits,[105] and some of its regulations are the earliest extant in regard to prize.[106] In 1388 we find the Sea Consulate in Perpignan, but it must be remembered that at this time that city was included in the Spanish kingdom of Aragon.[107] Finally, in the middle of the XV Century, the jurisdiction of the consuls of the Sea in Montpellier was enlarged, in imitation of Perpignan, to include a general commercial jurisdiction as well, with a very summary procedure, and with but a limited right of appeal.[108] Of particular importance for us is Bayonne, which possesssed its own statutes at the beginning of the XIII Century.[109] These statutes were gild statutes (*constitutio societatis navium baionensium*) and probably date from the year 1213. They really belong more to English law than to French, as the first line shows—*regnante illustrissimo Johanne rege Anglie felicis memorie*—and the conclusion is to the same effect—*quia vero proceres civitatis Baionensis viderunt et recognoverunt quod istud est ad profectum et bonum totius ville Baionensis . . . et honorem et exaltationem domini sui, regis Anglie.*[110] The provisions of the statutes[111] seem to concern themselves chiefly with affreightment, the hire of mariners, and the protection of the local monopoly of those of Bayonne. The receipts from freight are held in common, but special rewards are given to the diligent, and the shipper is protected by the official measurement of the cargo carrying capacity of each vessel. It was at this time, too, in

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[97] Goldschmidt, p. 222.

[98] Desjardins, p. 49. There was a "domus Pisanorum" in Montpellier in, and probably before 1177. Schaube, pp. 154–155. A Pisan consulate had existed there before 1304, for it was reëstablished in that year, Schaube, p. 155.

[99] Schaube, pp. 235–239.

[100] Goldschmidt, pp. 178–179. "Auszerhalb Italiens findet sich das Seeconsulat, ohne dasz eine direkte Entlehnung nachweisbar ist, in Montpellier, jedenfalls 1250, anscheinend als Seezollamt und Administrativbehörde für die Seeschiffahrt, endlich insbesondere in Spanien: Barcelona, Valencia, Mallorca. In Barcelona entwickelt sich aus dem Seegericht ein allgemeiner Handelsgerichtshof unter Beibehaltung des alten Namens." This statement of Goldschmidt's is questioned by Schaube, who asserts that there was "eine direkte Entlehnung" from Genoa, whither the Pisan system had spread with the modification that it had originally come under Treasury officials. Schaube, p. 235. "Immerhin hat auch die genuesischen form des Konsulats des Meeres in einem Seeplatz des Mittelmeeres Nachahmung gefunden und zwar in Montpellier, dessen enge Beziehungen zu Genua und Pisa zu bekannt sind, um einer besonderen Darlegung zu bedürfen." Also *ib.*, p. 21. Goldschmidt takes direct issue with Schaube, p. 177, n. 116; p. 178, n. 127.

[101] Schaube, p. 238. "Unter den Zwecken, zu denen ihre Einkünfte Verwendung finden sollten, wird ausser der Verbesserung des Seehafens und des Mündungsarmes noch die Unterdrückung des Seeraubs auf dem Meere wie auf dem Etang [the inland bays] besonders hervorgehoben."

[102] Goldschmidt, p. 223. Desjardins, p. 48.

[103] Desjardins, p. 49.

[104] Goldschmidt, p. 223, n. 126.

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[105] It is given in full, without a translation, in *Black Bk. of Adm.*, I, pp. 430–452.

[106] *Ib.*, I, p. lxxvi.

[107] Goldschmidt, pp. 179, 222, n. 124. Schaube, pp. 266–267.

[108] Schaube, p. 239. "Unter französischer Herrschaft erfuhren endlich die Funktionen der Konsuln des Meeres von Montpellier gegen Ende des Mittelalters eine wesentliche Erweiterung dadurch, dass sie im Jahre 1463 von Louis XI. mit Handelsgerichtsbarkeit ausgestattet wurden, genau nach dem Muster des Konsulats des Meeres in Perpignan, wie es in der Urkunde selbst heisst. Sie werden für zuständig erklärt in allen Streitigkeiten, die sich in Betreff kaufmännischer Waaren in Montpellier, sowie in den Häfen Aiguesmortes und Agde erheben würden. Ihr Verfahren ist summarisch (sommairement et de plain, sans proces et figueurs de jugement); Einlegung von Rechtsmitteln ist nur an die Konsuln des Meeres selbst und an die mit der Revision ihrer Sentenzen betraute Behörde zulässig."

[109] Goldschmidt, p. 223. "Das Seerecht ist früh kodifizirt im Süden, insbes. in Marseille Gesetzliches Recht besteht für die Kriegsmarine. Bayonne hat eine Seefahrergilde mit einem dem Beginn des 13. Jahrh.'s angehörigen Statut."

[110] Desjardins, p. 51.

[111] Pardessus, IV, pp. 283–289.

1221, that there was drawn up the famous treaty between Arles and Pisa in regard to the capture of private property at sea, which gives us the first rules on that still vexed subject.[112]

According to the present author's opinion the early legal development of Spain probably took place to a very considerable extent through France.[113] This is supported not only on the grounds of the close relations that always existed between the two countries, but also because of the fact that at this time, and until much later, because of the uncertain political conditions that prevailed, and especially because of the great amount of piracy, to which we have several times referred, sea travel on the Mediterranean was always conducted by coasting, or by sailing from headland to headland,[114] and always by armed convoy. Each city had its own zone or district,[115] and it is not likely that the Italian traffic would have gone direct to Spain at this earlier period of which we speak, however it may have been later. Provence seems to have been the meeting ground of Spanish and Italian influence. It is a fact that the municipality of Grasse, near Nice, signed a treaty of alliance and commerce with Genoa in 1170, and this treaty was renewed in 1198:[116] in 1179 a similar treaty was signed with Pisa.[117] In the later years of the XII Century the connection between Spain and Provence was close; Alfonso II was king of Aragon, count of Barcelona, and marquis of Provence and his brother Sancho was count of Provence. In the early XIII Century the count of Provence, Raymond Berenger V, was a minor, and his uncle, Pedro II, king of Aragon, declared himself to be Raymond Berenger's guardian.[118] In 1215 one of the factions of the city of Nice was successful, and it signed a treaty giving the city to Genoa, while the garrison of Aragon was driven out.[119] It therefore appears not to be improbable that the Italian law's contact with Spain was made by extending the influence which it already possessed in the south of France. On the other hand, Mitchell believes that, as the commercial connection between Pisa and Spain was permanent and close [120] [at this period?], the maritime courts of Spain were founded in immediate imitation of those of Pisa.[121] But before we come to speak of the legal development of the Spanish peninsula we must turn to the code of French maritime law that is altogether the most important for our purposes.

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[112] See below, p. 122.

[113] This opinion is strengthened by the early translation of the Rolls of Oléron into the Catalonian in the thirteenth century. Goldschmidt hints at this, p. 211. "Dasz neben dem italienischen Recht auch fränkisches Seerecht Eingang gefunden hat, dürfte die anscheinend dem 13. Jahrh. angehörige kastilianische Uebersetzung des Rechts von Oléron bekunden." Also in 1279 two merchants of Barcelona were appointed to see that the interests of the city suffered no harm in Narbonne and elsewhere. Goldschmidt, p. 206, n. 35.

[114] Goldschmidt, pp. 116–117. "Sogar die Mittelmeerfahrt ist noch im 12. Jahrhundert überwiegend Küstenfahrt. Noch bis in das 14. Jahrhundert wird, wie im hohen Alterthum, der Groszhandel zur See vorwiegend von bewaffneten Schiffskarawanen (*Conservæ, Convoys,* Admiralschaften) betrieben, wegen der alle Meere unsicher machenden Piraterie nicht allein der Saracenen und Normannen, sondern auch der Handelsstädte, der Könige, kleinen Dynasten und Feudalherren und der davon wenig verschiedenen organisirten Kaperei. Gerade die erhöhten Gefahren des Seehandels haben schon in byzantinischer zeit zu assecuranzähnlicher Modifikation der Havereigrundsätze geführt."

[115] The *riparia* of Barcelona; the *rivera* of Amalfi; *Goldschmidt,* p. 205, n. 27.

[116] Doublet, p. ci.

[117] *Ib.,* p. 132.

We come, then, to the *Rolls of Oléron,* which Sir William Holdsworth ranks in importance with the Consulate and with the Wisby Town-Laws, as one of the three leading codes of Europe,[122] and to which Sir Travers Twiss assigned a place second in historical importance only to the Decisions of Trani.[123]

One of the habits of mediæval law compilers was to add provisions that took their fancy to the laws that they were copying, yet even illustrious modern authors have not been exempt from that failing. The earliest extant collection of the Rolls of Oléron consists of twenty-four articles, the edition copied in the *Black Book of the English Admiralty* has thirty-five, Cleirac's XVI Century version numbers forty-seven,[124] while in 1828 Pardessus published a text containing fifty-six,[125] all of them prefaced by the original certificate of extraction of 1266![126]

The date of the Rolls is as uncertain as its original source of authority. Sir Travers Twiss in one place rather adopts the theory that the collection may have been compiled in Oléron by the order of King Richard I, and that it was approved and issued by him after his return to England from the Fourth Crusade, thus placing it well toward the close of the XII Century,[127] but elsewhere he takes a definite stand against this opinion and goes on to say, "the better opinion would seem to be that those judgments were the result of certain legal privileges granted by the Dukes of Guienne to the Commune of Oléron, prior to the island passing into the possession of the British Crown upon the marriage of Eleanora, daughter and heiress of William, Duke of Guienne, with Henry II of England, amongst which privileges was that of the Prud'hommes of the Commune exercising jurisdiction in maritime matters, and adjudicating on them in the Court of the Mayor, according to the usages of the sea, and the customs of merchants and mariners. There is clear evidence that such a jurisdiction was exercised by the Commune of Oléron in the fourteenth century." [128] Pardessus wavers between the end of the XI and the XII Century,[129] and does not believe that the collection originated in Oléron,[130] an opinion which Sir Travers Twiss successfully combats [131] and in which M. Desjardins concurs, though he does not agree with the Richard I theory,[132] but supports a French origin and dates the Rolls at least in the first half of the XII Century,[133] if not earlier. One is inclined to agree with the date suggested by the learned French and German authors.

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[118] Doublet, p. 183, n. 2.

[119] Pertz, *Monumenta Germaniæ Historica Scriptorum,* Vol. XVIII, p. 136.

[120] See Goldschmidt, p. 203. And note the privilege granted by Alfonso X in 1256 to the Pisans; Schaube, p. 20, n. 2.

[121] Mitchell, p. 56. And Schaube concurs.

[122] Holdsworth, *H.E.L.,* I, p. 302. *Black Bk. of Adm.,* IV, p. xxvi.

[123] *Black Bk. of Adm.,* II, p. xlvii.

[124] Printed and translated in 30 Fed. Cas. 1171–1187.

[125] Pardessus, I, p. 323, ff.

[126] *Black Bk. of Adm.,* IV, p. cxi.

Because of their importance a short summary is given of the twenty-four original articles, but, as our main consideration is the English law, the version found in the *Black Book of the English Admiralty* and printed in Volume I of Sir Travers Twiss' edition [134] has been used here.

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[127] *Black Bk. of Adm.*, II, p. lii.

[128] *Ib.*, I, pp. lxii–lxiii. M. Desjardins agrees, p. 33. "On peut très légitimement attribuer, ainsi que l'ont fait sir Travers Twiss et le professeur hollandais Pols, la paternité de ces jugements de la mer aux juges de la mer d'Oléron, qu'on y voie des sentences rendues dans des procès réels ou des déclarations sur le droit, fruit d'une longue expérience, et consignées par ces hommes rompus aux affaires maritimes dans un registre ou sur des rôles pour en perpétuer la mémoire."

[129] Pardessus, I, p. 301; VI, p. 629. See Wagner, pp. 67–68.

[130] Goldschmidt, p. 223, conjecturally suggests La Rochelle.

[131] *Black Bk. of Adm.*, II, p. lii.

[132] Desjardins, pp. 33–34. "Il serait puéril de contester leur origine française. . . . Il est donc bien difficile de ne pas les faire remonter à la première partie du douzième siècle, et l'on pourra toujours se demander si cette date même ne doit pas être encore reculée."

[133] Goldschmidt, p. 223, gives this date.

[134] *Black Bk. of Adm.*, I, p. 88; see also II, p. 210, and III, p. 4, for other versions.

Article I. The master is forbidden to sell the ship, but if he needs money for the ship's expenses he may borrow on the tackle, by the mariners' advice.

Article II. The master is forbidden to leave a harbor unless the majority of the mariners think it advisable to make sail: if the master does so against their advice, he is liable for the ship's value if it is wrecked.[135]

Article III. The master's duty in case of shipwreck: the mariners may have sufficient to carry them back if they have saved a greater value than that from the wreckage. The tackle must be kept safe for the owners.

Article IV. In case of shipwreck, where most of the goods are saved, the master may give back their goods to the merchants, who must pay freight *pro rata itineris,* or he may repair the ship, if but little damaged, or hire another ship, and finish the voyage. Freight is apparently due at the end of the voyage.

Article V. If the mariners leave the ship without the master's permission and she perishes, they are liable, unless she is anchored with two or three cables—even then they can be fined if they stay away too long.[136]

Article VI. Injury of a mariner on shore—only if he was injured in the ship's service is he entitled to be cured at her expense.[137]

Article VII. A mariner falling sick on shipboard is entitled to his wages, and ordinary cure, which is to be deducted from his wages. If he dies his heirs may have any surplus.

Article VIII. Jettison. The master must first consult the merchants. If they refuse, their opinion may be disregarded, provided a third of the crew agree that the jettison is necessary.[138] Cargo is to contribute to cargo, and also ship or freight, at the master's choice.

Article IX. If it is necessary to cut the mast or cables in order to save the ship the master must first tell the merchants, and the cargo is bound to contribute, paying before it is unloaded.[139]

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[135] Cf. Article XIV, *infra* p. 66.

[136] Cf. Article XXI, *infra* p. 66.

[137] This provision, in its broader sense that the mariner injured in the ship's service is entitled to be cured at her expense, has not been in force again until quite modern days.

[138] Cf. Ashburner, p. cclxx. The general Mediterranean usage required a majority of the merchants to consent.

[139] Cf. Ashburner, p. cclxx. By Baltic usage there was no right to contribution, unless there had been a previous agreement, following the Digest's rule.

Article X. Duty of the master and the crew to safely discharge the cargo.

Article XI. Liability of the master and crew for ill trimming of the sail.

Article XII. Quarrels among the sailors and between the master and the sailors.[140]

Article XIII. Towage and petty pilotage may be at the merchant's charges.[141]

Article XIV. If the master wrongfully discharges a mariner, the latter is entitled to full wages, and, if the master does not hire another equally skilful, he is liable if the ship is lost.

Article XV. If a ship collides with another ship at anchor, the total damage is halved between both ships and both cargoes, as it was thought that otherwise an old ship would lie deliberately in the way of a new one.[142]

Article XVI. Concerning damage caused by a ship's anchor.

Article XVII. Concerning the food of the mariners.

Article XVIII. Provisions whereby mariners may embark a small quantity of freight on their own responsibility, instead of sharing in the general freight.

Article XIX. Retention of a mariner's wages in the port of discharge to enforce his return to the port of hiring.

Article XX. Rights of the mariners in case the voyage is shortened or prolonged.

Article XXI. Liability of the mariners to the master if they are injured or delayed as the result of going ashore in port on their own concerns.

Article XXII. Demurrage. A merchant must load a hired ship in due time or pay damages to be divided between the master and the mariners.

Article XXIII. The master may sell part of the cargo, to be charged to the ship at the market price at the port of destination, if he is in a foreign port without money and lacks necessaries. The part of the cargo sold is to pay freight.[143]

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[140] Cf. Article XIV.

[141] Not in Cleirac's version.

[142] Cf. Ashburner, p. cclxxxviii. The general provisions in the Mediterranean codes imply that it is easy to determine where the blame lies, and also that it is on one side. This appears to be the first code in which special rules are laid down for a collision, where it is impossible to fix the liability. The rule applies where one or both vessels are damaged. Here there is apparently no idea of liability founded on negligence. See also Marsden, *Collisions at Sea*, 8th ed., p. 135.

Article XXIV.[144] The pilot's duty is to bring the ship safely to her berth: the master must see to her moorings.

"These dispositions, whose rapid diffusion is readily explained by their basis and by their form, since they are conceived in a very practical spirit and are edited in a style accessible to poorly educated people, are the basis of the Rolls independent of additions." [145] They "were accepted as the common maritime law in all the countries that bathe in the Atlantic Ocean or the North Sea, at the same time that the kings of Castile were giving them legislative force in the Mediterranean ports and that the merchant cities of the Baltic were intercalating their dispositions in their own special legislation." [146]

As we have already seen,[147] the original articles were soon incrusted about with additions. Eleven more articles, numbered XXV to XXXV, are to be found in the *Black Book,* and Sir Travers Twiss believed them to be perculiar to the English Admiralty.[148] They purport at their commencement to be ordinances, although the concluding words declare them to be judgments. They bear evidence of the extension of commerce which made the laws of the earlier mediæval period no longer sufficient, and the addition to the law apparently began in the XIII Century.

Only two of the additional articles are certainly English.

Article XXXV dates from 1200–1201 and attempts to compel all ships to lower their sails to the king's ships, if commanded.[149]

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[143] *Black Bk. of Adm.,* I, p. 119, n. 3. Power to sell part of the cargo to procure provisions was not granted by the Roman law. It has been argued from the silence of the Rolls as to any power on the part of the master to borrow on the credit of the cargo, that the contract of bottomry was not known when the Rolls were compiled. Cf. the Consulate of the Sea, Ch. 106.

[144] Articles XXIII and XXIV in Cleirac's version deal with pilotage and provide that the pilot must make satisfaction for his negligence or else lose his head. Berthing and mooring are not mentioned. These articles are similar to articles XXXIII and XXXIV of the *Black Book* edition.

[145] Desjardins, p. 35.

[146] *Ib.,* p. 31.

[147] *Supra,* p. 63.

[148] *Black Bk. of Adm.,* I, p. 121, n. 3. *Ib.,* I, p. lxx. "It would appear from the opening words of each of them, viz. 'It was ordained and established for a custom of the sea,' that their authority rested upon something more than mere usage, but there is nothing which indicates directly the occasion of their being adopted, as part of the system of maritime law to be administered in the Maritime Courts of England."

[149] Sir Travers Twiss dates this at March 30, 1201. *Ib.,* I, p. 129, n. 3.

Article XXXII is probably an ordinance made by Edward I about 1285, modifying Article VIII, and substituting the old provision of Roman Law,[150] whereby in case of jettison only the cargo contributes to the loss, and apparently not the ship or her tackle. Nothing is said in regard to the freight.[151]

> "The thirty-second article, however, contains provisions on the subject of Jettison, which are interesting in two respects, as they profess to be, and actually are, founded on the Roman Law, and they represent a state of the law of general average, which was received in England at a very early period, and which came into question in the twelfth year of the reign of Edward I. In that year the barons of the Cinque Ports appealed to the King against a claim of general average made by certain merchants of Gascony and of England in accordance with the law, as expressed in the provisions of the thirty-second article of the Black Book, when the King was pleased to decide in favour of the barons, and to establish for the future a rule of contribution in cases of jettison of cargo more favourable to the ships and the mariners, than that which had hitherto prevailed, and which had been transmitted by the Roman jurists as a tradition of the Rhodian Law." [152]

This is one of the very few cases of the modification of a custom by statute or by edict.

Of the remaining nine articles, six are now thought, contrary to Sir Travers Twiss's opinion, probably not to be purely English. Professor Pols, of Utrecht, found in the library of the Hague a manuscript entitled "Coustume de la Mer faicte entre l'Empereur de Romme et le roy Richart observez a Bourdeaulx, Angleterre, Britaigne, Normandie, Escosse et en Pruyche." [153] In this manuscript Articles I to XXIV correspond with the same ones of the Rolls. Articles XXV to XXXI arise from an agreement made between the duke or the count of Brittany and those interested in the navigation of the waters of Brittany, concerning the seignorial right to vessels and goods shipwrecked on the coasts of Brittany. But Articles XXXII to XXXIV are the same as XXV to XXVII in the version of the *Black Book,* and Articles XXXVI to XXXVIII correspond with XXIX to XXXI. Article XXXV provides for the discharge of a chartered ship by the charterer within twenty-one working days after she has arrived in port, and is not to be found in the *Black Book.*

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[150] Lex Rodia de Jactu, Dig. XIV, 2, 1. *Supra* p. 5.

[151] *Black Bk. of Adm.,* I, p. 127, n. 4.

[152] *Ib.,* I, p. lxx.

[153] *Nouvelle Revue Historique,* 1885, pp. 462 *et seqq.*

This manuscript is a copy of the Rolls of Oléron, made at Middelbourg in Zeeland at the beginning of the XVI Century, and leads Professor Pols to think that the provisions in the English manuscripts after Article XXIV, never till now found in other than English manuscripts, are genuine, and are later copies from the registry of Oléron. They are not copied from an English manuscript, because of the seven interpolated articles and the special Article XXXV; hence it seems to follow that both the English and the Dutch manuscripts were copied from the same source—Oléron.[154]

Following is a synopsis of the six English articles which correspond to those in the Middelbourg manuscript:

Article XXV. If a merchant freights a ship and she is detained through the fault of the master or of the lord or of the owner, the merchant may abandon his contract and even recover damages if he cannot find another ship.

Article XXVI. A merchant freighting a ship is entitled to its entire capacity.

Article XXVII. The merchant may load the hull as full as the master could reasonably do.

Article XXIX. The customary gratuities to the mariners are not legally due.

Article XXX. The master to victual the charterer: care of a cargo of wine.

Article XXXI. The cargo must be unloaded within twenty-one working days after arrival in port, but the master has a lien for the freight.

It is uncertain whether or not the remaining three articles represent English custom solely.

Article XXVIII. Rights of mariners whose wages are determined on a freight basis.[155] The master is entitled to freight on goods jettisoned, as the freight or the ship, at his choice, must contribute to the loss.[156]

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[154] *Nouv. Revue Hist.*, 1885, p. 459. "L'absence de cette addition dans les manuscrits anglais, qui mettent tous une autre à sa place, et la différence assez considerable du texte peuvent être considérées, jusqu'à preuve contraire, comme des indices que nos additions ne proviennent pas de quelque copie anglaise, mais d'une copie indépendante prise à la source même, au Registre d'Oléron." See also Desjardins, p. 36. He agrees that the six articles can no longer be held to be exclusively English.

[155] Cf. Article XVIII, *supra*, p. 66.

[156] Cf. Articles VIII and XXXII, *supra*. Article XXXII evidently overrules Articles VIII and XXVIII in regard to the ship's contribution. "But would

Articles XXXIII and XXXIV.[157] Duties, liabilities, and penalties of a coasting pilot.

These Rolls were adopted in England and were incorporated in the *Black Book of the Admiralty;*[158] they were also followed in the city courts of London and Bristol. There is a reasonable presumption that they had been in use prior to the report of the king's judges in 12 Edw. III (1338), because of the tenor of the report itself, the presumption gaining in strength from the fact that two manuscripts of the Rolls are extant in the archives of the city of London, their handwriting being as early as the reign of Edward II.[159] An early copy is also to be found in the *Red Book of Bristol.*[160] "That the Rolls of Oléron were received as Law in the Maritime Courts of England after 12 Edward III, is clear from the language of a judgment given by the mayor and bailiffs of the City of Bristol, and certified by them to the Lord Chancellor."[161]

At Oléron, too, there was a maritime court, which became quite famous and acquired a good name for itself.

> "The Coutumier of the Commune of Oléron . . . reveals to us the fact, not merely that there was a court at Oléron which administered the Law Maritime, and that its judgments were considered by the prud'hommes of the commune to be of such importance that they were placed by them on record amongst the good judgments and the good customs and the good usages of their ancestors, but that mariners of other countries were in the habit of resorting to the court at Oléron for the sake of obtaining its judgment upon their disputes."[162]
>
> "The circumstance that Breton mariners and merchants had frequent recourse to the Mayor's Court at Oléron for the settlement of their disputes in maritime matters in the fourteenth century, raises a presumption that the court at that time was in considerable repute as a Court of Maritime Law, and there are documents belonging to the twelfth and thirteenth centuries, which refer to Oléron under circumstances, which warrant us in supposing that it was at that period a port much frequented

freight contribute?" asks Sir Travers Twiss. Probably. Cf. Ashburner, p. cclxxvi.

[157] See above, p. 67, n. 144.

[158] *Black Bk. of Adm.*, III, p. xi; I, p. xxviii.

[159] *Ib.*, I, p. lviii.

[160] *Black Bk. of Adm.*, I, p. lxi, n. 1. *L. Q. R.*, XVII, p. 234.

[161] *Black Bk. of Adm.*, I, pp. lxi–lxii. "In this judgment the Law and Custom of Oléron (lex et consuetudo de Oléron) are recited as founding the obligation of the master of a ship to protect the cargo from trespass on the part of the crew, and sentence was given in accordance with that Law in favour of the plaintiff."

[162] *Ib.*, II, p. xxxvii.

by foreign shipping.[163] . . . It is evident . . . that the Law Maritime was habitually administered in the Mayor's Court at Oléron to passing mariners, not merely in suits between foreigners and burgesses of Oléron, but in causes where both the parties to the suit were foreigners." [164]

Chapter 87 of the Coutumier is a judgment in a suit between two foreigners and conflicts with the general rule previously laid down in Chapter 64. This judgment will shortly be discussed at more length.

The Coutumier is to be found in the Bodleian Library in Oxford, and is Douce MS. 227.[165] It contains a collection of customs and usages and judgments upon the most diverse subjects, and it was compiled by the clerk of the commune under the direction of the mayor. The manuscript itself, according to its colophon, dates from February 10, 1344,[166] but its provisions are somewhat older. "That it was not drawn up before the reign of Edward I, may be regarded as almost certain. . . .[167] There is, however, other evidence in the Coutumier connected with the Law of the Sea as administered in the Mayor's Court in cases of jettison of cargo, which renders it probable that the Coutumier was compiled some time after a remarkable judgment had been rendered on that subject by King Edward I, in (1285)." [168] Most of the subjects dealt with in the Coutumier are of a very local importance, but twenty-one of its articles[169] deal in whole or in part with maritime regulations. Five of them provide for various dues: the ship pays the keelage dues and the plankage dues and ordinary pilotage; if the merchants wish to have more mariners or more pilots in order to ensure greater safety, it should be at their expense: the cargo pays the stowage dues.[170] The ship's stores and the mariners' personal ventures do not pay customs duties.[171] The mariner is bound only to navigate the ship, and is not bound to anything for which he is not engaged. But if he, or anyone on board the vessel, sees anything outside it which he can take possession of and put on board the vessel, he shall have a half, and the owner the other half: this chapter is so vaguely drawn up that it may have been meant to apply to piracy or to flotsam.[172] Chapter 76[173] to some extent conflicts with Chapter 96,[174] as given above, for it provides that the ship shall pay for the stowage, as well as for plankage and dockage, the cargo paying for towage. It may be that Chapter 96, which is obscure, means that only cargo belonging to strangers and loaded in Oléron, shall pay stowage. Chapter 77[175] is in regard to the disturbance of unattended fishing nets at sea. Chapter 82[176] provides that where two ships are at anchor and through accident one breaks loose and collides with the other, the total damage is to be divided, but if the breaking loose was due to negligence or poor tackling,

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[163] *Black Bk. of Adm.*, II, p. lv. Desjardins, p. 34, n. 1. "L'art 87 du grand coutumier de l'île d'Oléron (*vide Black Book*, II, p. 382 à 384) établit manifestement qu'il avait dans cette île une cour maritime appliquant une loi commune maritime aux contestations entre étrangers."

[164] *Black Bk. of Adm.*, II, p. liv.

[165] It is described in the catalogue as "A collection of legal cases and regulations apparently compiled by the community of Oléron."

[166] "Et fuit completus anno domini M°CCC°XL° quarto scilicet decima die mensis Febroarij."

[167] *Black Bk. of Adm.*, II, p. xxxii.

[168] *Ib.*, II, p. xxxiii–xxxiv. "A complaint appears to have been made in that year to the king by the barons of the Cinque Ports of England, that the merchants of Gascony, as well as those of England, Wales, and Ireland, were in the habit of compelling the barons of the Cinque Ports and other owners of English merchant vessels in cases of jettison of cargo to contribute pro rata according to the value of their vessels, and of the apparel and stores of their vessels, as well as of the wines or merchandise which the master and crew might have on board. The king on this occasion, having heard the reply of the merchants, ordained that in future such contribution should not be required from the owners of the vessels on account of the vessels themselves, or of their apparel and stores, or of any goods taken on board for the use of the crew, but only on account of such goods as the master and crew might have on board as merchandise, and on account of any other merchandise on board. It may be presumed from this complaint that up to A. D. 1285, the Roman law of contribution (Itaque dominum etiam navis proportione obligatum esse. Fr.

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2. Paulus ad edictum, l. xxxiv) had been enforced in the ports of the duchy of Aquitaine against the owners of British merchant ships in cases of jettison of cargo; but it appears on reference to the Coutumier (Ch. 87), that a judgment is recorded there as having been given in the Mayor's Court at Oleron in a case of jettison of cargo, which is in conformity with the ordinance of King Edward I. It is not an unreasonable conclusion from this fact, coupled with the further circumstance that, when the Rolls of Oleron were compiled, a different rule of judgment was upheld, (Article VIII), that the judgment in the Mayor's Court, which is recorded in the Coutumier, was subsequent in point of time to the ordinance of King Edward I, and was governed by it." This is the occasion on which was promulgated Article XXXII of the Rolls; see above, p. 68.

[169] I have copied out these articles from the MS. and they are to be found in my Appendix I, the page references being to the original MS. Translations are given in *Black Bk. of Adm.*, II, pp. 305 *ff.*

[170] MS., pp. 133–135; below, pp. 405–406.

[171] *Ib.*, p. 49; below, p. 402.

[172] *Ib.*, p. 86; below, p. 403.

[173] *Ib.*, p. 112; below, p. 403.

[174] *Ib.*, p. 134; below, p. 405.

[175] *Ib.*, pp. 112–113; below, p. 403.

[176] *Ib.*, pp. 117–119; below, pp. 403–404.

the offending ship is to pay all. This is a distinct advance upon Article XV of the Rolls, which seems to have no conception of mere negligence. In line with this idea is Chapter 86,[177] which provides that a mariner negligent in protecting ship or cargo is bound to make compensation for any damage received by the one or the other. Chapter 88[178] treats of the duties of the master of a ship: the end of Chapter 93[179] provides that property in goods found on the sea is not lost for a year, and also that the finder shall be compensated. Chapter 94[180] provides that in jettison only cargo shall contribute to cargo, and not the ship and her tackle and stores.

The remaining provisions deal entirely with partnership. Chapter 63[181] provides that when there are partners and one uses the ship for a voyage, the others shall then also have it in their turn, no regard being had to delay by tempests or adverse weather. Under the next chapter[182] one partner can apparently fix a price for the vessel and compel the other to buy him out or else to sell out at that price, but the vessel must be in port so that each partner can see it. If a partner has sold or exchanged his part to a stranger, any other partner can take it over on the same terms. Chapter 83[183] deals with part owners, one of whom can not or will not furnish his share of the ship's expenses. In such a case the principle is the same as in modern days, that it is better that the ship should be employed,[184] and therefore the other partner may fit out the ship. The hull is then bound to him until the proper share of the expenses has been paid. If the non-contributing partner, in order to pay what he owes, finds freight at a rate more advantageous than the outfitting partner, the latter may not claim to share it on such an occasion, for a special division has been made on this voyage. Chapter 86[185] is witness to a peculiar state of affairs, a kind of a germ of the law of agency. It is evident from this chapter that the mariners were not necessarily hired jointly but may have been independently provided by each partner. In the case of a seaman's negligence and of ensuing damage, the one partner could demand compensation either from the seaman or from the other partner who had hired him, unless the first partner had previously recognized the mariner's competence. But the partner who was liable to pay, and paid, the damages, could then claim that sum from the mariner. Chapter 87 [186] conflicts with provisions of Chapter 64, for it favors the sale of a partner's interest publicly, and explicitly discourages the rule of Chapter 64 that a partner ought to be entitled to take over a share sold to a stranger on the same terms. As Chapter 64 is more or less in the nature of a general rule, and as Chapter 87 was a special decision in a suit between two foreigners especially brought to Oléron, one may regard it as a case of a later decision overruling an earlier statute, quite in the modern style.

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[177] MS., p. 122; below, p. 404.

[178] *Ib.*, p. 124; below, p. 405.

[179] *Ib.*, pp. 132–133; below, p. 405.

[180] *Ib.*, p. 133; below, p. 405.

[181] *Ib.*, p. 83; below, p. 402.

[182] *Ib.*, pp. 83–86; below, pp. 402–403.

[183] *Ib.*, pp. 119–121; below, p. 404.

[184] "Ships were originally invented . . . to plough the seas, not to lie by the walls." Molloy, I, 308. Compare the old American admiralty practice with respect to sailing ships; Benedict on Adm., 4th ed., § 187.

[185] MS., pp. 122–123; below, pp. 404–405.

But before proceeding to the other codes in their chronological order we must trace briefly all the descendants of the Rolls of Oléron. The Rolls, as modified and amplified, became, so to speak, the maritime common law of the North Sea and the Atlantic Ocean.[187] The kings of Castile gave them the authority of law in their ports in the Mediterranean, and the trading cities of the Baltic incorporated their provisions into their own maritime law.[188] They were adopted by the seaport towns of Normandy and Brittany and spread into the Low Countries, where they were adopted by such cities as Bruges and Damme.[189] The Judgments of Damme was the earliest body of sea laws compiled for use in Flanders,[190] and its twenty-four articles in old Flemish correspond with the twenty-four articles of the Rolls of Oléron, as set forth in the Admiralty's book, so closely that some writers have claimed that the Judgments of Damme is the original code, of which the Rolls of Oléron is only a French translation,[191] and attention is drawn to the fact that Damme was the Flemish entrepôt of the wine trade with France.[192] "M. Pardessus has sifted this question very carefully, and he agrees with Professor Schlegel in his opinion, that the Maritime Laws of Damme have their source in the Judgments of Oléron, more particularly as the commerce of Damme with Bordeaux, prior to A. D. 1330, was not of that importance which would have given occasion for those Judgments, the existence of which, prior to that time, is placed beyond all dispute." [193] Such was the opinion of Sir Travers Twiss and the matter was finally and definitely settled when M. Warnkœnig published in his *History of Flemish Law* the text of a Bruges manuscript of the Judgments of Damme, headed, *"Copy of the Rolls of Oléron."* [194]

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[186] MS., pp. 123–124; below, p. 405.

[187] Goldschmidt, pp. 223–224. "Wichtiger ist die zwischen 1285–1314 verfaszte *coutume* der Insel Oléron bei La Rochelle, vor allem aber die Sammlung der Urtheile (Weistümer) des Seegerichtshofs von Oléron . . . Dieses auf fränkischer Grundlage beruhende Seerecht gehört in seinem ältesten Theile (24 Artikel gaskognischer Redaktion) vielleicht noch dem 12. Jahrh. an; hinzugetreten sind zahlreiche Zusätze (in der normannisch-bretonischen Redaktion). Es ist nicht allein in Flandern, Holland, England recipirt, sondern als Hauptbestandtheil des "Waterrechts," des später sogenannten Wisbyschen Seerechts, auch im nördlichen Europa zu nahezu gemeinrechtlicher Geltung gelangt."

[188] *Black Bk. of Adm.*, II, p. xlvii.

[189] Holdsworth, *H.E.L.*, I, p. 301.

[190] *Black Bk. of Adm.*, I, p. lxiii.

The later importance and multiplicity of the commercial connections of Damme explain very readily how the Rolls of Oléron came to be introduced into Flanders.[195]

> "There is evidence of the fact that the Judgments of Oléron had been received in Flanders and had been translated into the Flemish tongue as early as in the middle of the fourteenth century. There is, however, no similar evidence of the fact of the Dutch Sea-Laws having been reduced into writing in any of the Dutch seaports at so early a period.[196] . . . These latter Judgments [of Damme] are an early Flemish version of the Judgments of Oléron, translated for the use of the maritime tribunal of Damme." [197]
>
> "It is thus placed beyond doubt that the Oléron Sea-Laws were received in Flanders, and were circulated in the Flemish tongue in the middle of the fourteenth century, sufficiently early to allow of their being introduced at Wisby under the title of 'Sea-Laws in Flanders.'" [198]

As for the Judgments of Damme, so for the laws of Wisby it has been claimed that they are the most ancient compilation of mediæval maritime law in Europe, and that the Rolls of Oléron are only an early French translation of a part of the collection,[199] but the facts that have been already stated do not even make it necessary today to confute the theory by the use of the authority of Sir Travers Twiss.

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[191] *Black Bk. of Adm.*, III, p. xviii.

[192] *Ib.*, IV, p. xliv; Desjardins, p. 74.

[193] *Black Bk. of Adm.*, III, p. xix.

[194] *Nouv. Revue Hist.*, 1885, pp. 454–455. "La question [the priority of the Judgments of Damme to the Roles of Oléron] cessa d'en être une, depuis que M. Warnkœnig découvrit et publia dans son *Histoire du droit flamand* le texte des prétendus *Jugements de Damme* du manuscrit de Bruges, s'intitulant franchement 'Copie des Rôles d'Oléron des jugements de la mer.'" Also Desjardins, pp. 31–32.

[195] Desjardins, pp. 74–75.

[196] *Black Bk. of Adm.*, IV, p. xxxvii.

[197] *Ib.*, p. xliv.

[198] *Ib.*, p. xlvii.

Wisby had had a code of laws as early as 1320,[200] and it is probable, from the evidence of charters of Riga, that in the XIII Century she had some kind of a maritime law that was observed in several of the eastern ports of the Baltic,[201] perhaps even a written code. But the chief fame of Wisby rests on her Town-Laws, the "Hogheste Water-Recht." The earliest printed edition dates from 1505 and contains sixty-six articles,[202] of which the first fourteen are undoubtedly from a Baltic source[203] and the last twenty-seven from a Dutch source.[204] Articles XV to XXXIX are "beyond all doubt a Saxon or Low-German version of the Judgments of Oleron, translated either from the so-called Sea-Laws of Flanders, which are a Flemish translation of the Jugements d'Oléron, or immediately from a Gascon text, but the better opinion would seem to be . . . that they are a Low-German translation of the so-called Flanders Sea-Laws,"[205] that is, these provisions were introduced at Wisby through a Flemish channel and not directly from Oléron[206]—so far did the humble little island's influence extend. While the laws of the city of Lübeck were of great influence within the Baltic, the laws of Wisby had greater influence over the foreign commerce[207] of the north of Europe.

As typical examples of the frank borrowing of laws that continually went on among the various cities one may mention that in the XIII Century cities in Holstein and Oldenburg received copies of the laws of Lübeck, "the Maritime Queen of the Baltic Sea in the Middle Ages."[208] A letter of September 8, 1447, shows that Wisby's text of the Sea-Laws was supposed to be very clear and excellent.

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[199] *Black Bk. of Adm.*, III, pp. xix-xx.
[200] *Ib.*, IV, p. xxiii.
[201] *Ib.*, p. xxv. See Wagner, pp. 68–71.
[202] Desjardins, pp. 82–83.
[203] *Black Bk. of Adm.*, IV, p. xxvii.
[204] *Ib.*, p. xxviii.
[205] *Ib.*, p. xxvii–xxviii.
[206] *Ib.*, p. xliv.
[207] Holdsworth, *H.E.L.*, I, p. 302.
[208] *Black Bk. of Adm.*, IV, pp. xxi–xxii.

"The burgomaster of Dantzic had already spoken to the envoy from Wisby at the last recess of the Hanse Confederation at Lübeck upon the subject of procuring a copy of the Wisby text of the 'Sea-Laws,' and on this occasion the town council of Dantzic formally renewed by letter their request to be favoured with a copy of the Wisby text, to be made at their own expense." [209]

In 1254 the senators of Lübeck, following a special request addressed to them by the master and brothers of the Teutonic Order of Livonia, sent them a collection of their laws. This code, numbering 240 articles, has been preserved in the library of the University of Göttingen, and Sir Travers Twiss has extracted and translated some of its provisions dealing with maritime law.[210]

Finally we come to the third of the three famous codes, the Consulate of the Sea of Barcelona, a city that one can properly call the second home of the Sea Consulate.[211] We must first briefly consider the legal situation in Spain at the time of its appearance.

Twelve years after having conquered Valencia from the Moors, James I, king of Aragon, published an extended body of laws under the title *Customs of Valencia* (1250).[212] No other document better attests the continuity of Roman traditions in the Spanish peninsula: [213] almost all of its provisions are free translations, in the common language, of the Digest and of the Code. The *Customs* determine with remarkable precision the duties of pilots and of joint owners of ships against the loaders, the influence of *force majeur* on liability, the permanence of the rights of owners over objects cast into the sea because of bad weather, the rules to follow in case of prize, of shipwreck, of contribution as a result of jettison, and the duties of the mariners. Nevertheless, this did not answer all needs: in the year 1258 the same prince confirmed a regulation for navigation prepared by the prud'hommes of Barcelona,[214] and of which the provisions were probably followed in all his States.[215] "The seamen are compelled to remain with the ship after it has arrived at its destination until the cargo is discharged, the *dominus navis* must instal a sworn clerk and must victual [the ship] for a fortnight, the captain of a sheltered ship must in case of necessity tow a ship entering the port, the sailors must drag the ship up on the beach if required, the owners of lighters must properly *(bene et ordinate)* discharge the cargo without overloading the lighters and without carrying away any of the crew until complete discharge, etc. According to the twenty-first and last article, the people who are on board a ship should choose two notables *(proceres)*, charged to decide, with the addition of two or five other persons left to their choice, the disputes which may happen in the ship during the crossing, and to exercise, if necessary, the same functions in a foreign country." [216] These two *probi homines ripariæ* have now become the travelling consuls so well known in the sister field of mercantile law, and they are to regulate matters and to decide both according to the royal jurisdiction and according to that of the prud'hommes of Barcelona. We see here a double jurisdiction and the council of the prud'hommes seems to be a council of administration in maritime affairs with authority coördinate to the king himself.[217] In the same way the ordinance itself is to have validity at the pleasure of the king *"et dictis probis hominibus ripariæ B,"* and indicates a mutual legal power. All persons concerned are to take an oath to both, and fines are to be equally divided.[218]

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[209] *Black Bk. of Adm.*, IV, p. xxxiii.

[210] *Ib.*, IV, pp. 287–303. Desjardins, p. 55.

[211] Schaube, p. 289.

[212] See Pardessus, V, pp. 333, *ff.*

[213] *Black Bk. of Adm.*, II, p. lxvii—"these [provisions] are, with one or two trivial exceptions, stale relics of the maritime law of imperial Rome, and belong to the period when the ancient law of the sea was giving place to a new system of law." Goldschmidt, p. 203.

[214] Desjardins, p. 46, n. 13. "Noverint universi quod nos Jacobus . . . attendentes ordinationes inferius scriptas, quas vos Jacobus Grunni, fidelis noster, de voluntate, assensu et mandato nostro fecistis, et ordinavistis cum consilio proborum hominum ripariæ Barchinonæ." Goldschmidt, p. 204.

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[215] *Black Bk. Adm.*, II, pp. lxvi–lxvii. "The Corporation of the Prud'hommes . . . is spoken of as a council of administration in maritime matters, of co-ordinate authority with the king himself. This ordinance appears to the Editor to be the true starting point of Modern Maritime Law in the kingdom of Aragon."

[216] Translated from Desjardins, pp. 46–47.

[217] *Black Bk. of Adm.*, II, p. lxvii.

[218] Goldschmidt, pp. 205–206. "Im Jahre 1258 bestätigt König Jacob I. die von seinem Beamten Jacobus Grunni in seinem Auftrag *cum consilio proborum hominum ripariæ Barchinonæ super facto et ordinatione eiusdem ripariæ* verfaszte Schiffahrtsordnung. Die Ordnung soll bestehen so lange es dem Könige "et dictis probis hominibus ripariæ B." gefällt. Ist so das Verordnungsrecht dem Könige und der *riparia* gemeinsam, so sollen auch alle Betheiligten den Eid leisten dem Könige und den *probi homine riparie*, sollen die Buszen zur Hälfte an den König, zur Hälfte an die Gemeinschaft der *riparia* (*commune*) fallen. Entscheidung von Streitfällen zwischen Rheder und Mannschaft soll durch 2 *probi homines ripariæ* geschehen; insbesondere aber heiszt es von den Reiseconsuln, dasz sie ordnen und entschieden sollen *"ex parte Domini Regis salva*

This evidence points to a strong and established gild organization, and such seems to have been the case. At this very time there existed the *comune riparie Barchinonæ,* and the heads of this gild were known as *probi homines.* According to an ordinance of the previous year, 1257,[219] the prud'hommes were to elect a mayor annually, who, sitting with them in council, was charged with such administrative duties as the repair of the harbor facilities, the defence of the coast, and the regulations necessary for the common use of sea travel. Before 1265 the gild had 200 members, and its prud'hommes, apparently four in number, sat in the city council.[220] One can only conjecture how far back of 1257 the gild went, for there are no earlier records known, but the excellence of its general organization would indicate a life of some years.

> "The *fuero real* [1254–1255],[221] which ought, in the opinion of Alfonso X, king of Castile, to replace all the old local customs, contains only a few very insignificant dispositions concerning maritime law. It is not at all like the vast collection known under the name of *Partidas,* in which Alfonso, eleven years later,[222] tried to co-ordinate the principles of public law in force in the thirteenth century with canon law, Roman law and the usages of commerce. The second *partida* treats, with great developments, in title XXIV, of war on the sea (*que fabla de la guerra que se face por mar*), in title XXVI of prizes; in the third it is minutely explained how a charter of affreightment should be made; in the fifth there is determined successively the responsibility of vendors of ships, of loaders, of the mariners as well towards persons as towards goods received on the ships, the powers of masters over the seamen whom they employ; later on the code treats of contribution in general average, of the restitution of wreckage, of naval faults, voluntary or involuntary

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sua iurisdictione et ex parte consilii proborum hominum ripariæ Barchinonæ;" es ist also auch die Jurisdiktion getheilt."

[219] Schaube, p. 248.

[220] Goldschmidt, p. 205. "Um diese zeit hat eine Seehandelsinnung, vielleicht Gilde, bestanden: Das *comune riparie Barchinonæ,* welche *probi homines* (*proceres—prohombres,* entsprechend den französischen *prud'hommes*) zu Vorstehern hatte. Nach einer V. vom 13. Januar 1257 sollen die *probi homines illius riparie* (*riparia = comune riparie*) auf je 1 Jahr einen *major* als *caput* wählen, welcher *cum consilo* der übrigen *probi homines* für Instandhaltung der Hafeneinrichtungen, Vertheidigung der Küste und sonstige im gemeinen Nutzen der Seefahrt erforderlichen Einrichtungen zu sorgen hat. In demselben Jahre finden wir in dem damals 200 (seit 1265 nur 100) Mitgleider (*prohombres* oder *iurados*) umfassenden groszen Gemeinderath der Stadt 4 *"prohombres de mar."* *Black Bk. of Adm.,* II, p. lxvi.

[221] Goldschmidt, p. 202, n. 8.

[222] Goldschmidt, p. 202, gives 1258 as the date, but at p. 179 gives 1266. The *Encyc. Brit.,* XXV, p. 547, gives *circa* 1260. It was not promulgated until 1338.

and of their indemnity, of the indemnity for loss caused by corsairs and of recapture, and, finally, of the remedies accorded against ships to those persons who have equipped or repaired them or who have lent money to equip or repair them. Everyone knows that the *Partidas,* successively developed and modified, annotated in 1550 by Diaz de Montalvo, in 1611 by Lopez, hold a very great place in the history of Spanish legislation." [223]

"This last provision [of travelling consuls, made in the regulation of 1258] was modified by the privilege of 1266, accorded by James I to the same prud'hommes, who are to nominate thenceforth, each year, the consuls charged with rendering justice *in navibus et lignis ad partes ultramarinas navigantibus.* The latter received very extended powers *tam in terra qua* [sic] *in mari,* and could themselves delegate their functions; that is, to make 'consuls' in their turn and to invest them with their proper powers.

"The privilege of 1269, the pragmatic of 1271 granted by the same prince to the people of Barcelona, and the *recognoverunt proceres* of 1283,[224] contain some rules concerning the restitution of money or goods taken in commenda or in partnership for a maritime voyage. The two pragmatics of Alfonso III, dating from 1288, concern the one the protection of shipwreck, the other the repression of piracy: the latter is perhaps the first requirement that privateers shall bring back their prizes to the port of armament." [225]

In the later registers of the members of the city council one no longer meets with the *prohombres de mar* as representatives of a separate maritime gild, and it seems probable that this gild was merged with the general merchants' gild in 1279,[226] particularly since in that year consuls of the sea were first appointed at Barcelona for the settlement of maritime disputes.[227] The consuls, as we shall see in a moment, settled the matters that came before them "according to the customs of the sea." The mention of the consuls in 1282 [228] most probably refers to officials appointed for some special affairs. In 1301,[229] and thereafter, two *consules del mar* are elected annually by the city officials: in 1315 the enforcement of an ordinance is left to the city council of Barcelona and to the *consols de la mar*. Finally there was published in 1347 a royal ordinance by which the municipal authorities of Barcelona were granted the privilege to choose for all time the annual *consules maris et iudicem eorum*[230] according to the privileges granted to Mallorca and, originally, Valencia—that is, to add to their regular court a court of appeal. With the granting of this privilege the *consulatus maris* of Barcelona can no longer be considered as in any way a gild court; it has become a Maritime Court and an office of maritime affairs appointed by the city officials, and it concurs in the appointment of the consuls to serve abroad.[231]

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[223] Desjardins, p. 48.

[224] Goldschmidt, p. 204.

[225] Desjardins, p. 47.

[226] Schaube, pp. 248–249, p. 252. Goldschmidt, p. 206. "In den späteren Verzeichnissen der Mitgleider des Gemeinderaths begegnen die *prohombres de mar,* also Vertreter einer besonderen Seehandelsinnung, nicht mehr, und es hat so den Anschein, als ob die Seehandelsinnung in der allgemeinen Kaufmannsinnung, welche 1279 das Recht erhielt sich 2 Vorsteher zu wählen, aufgegangen sei."

[227] *Black Bk. of Adm.,* II, p. lxvi.

[228] Schaube, p. 249.

[229] *Ib.,* p. 249.

"In 1283, Pedro III of Aragon took a measure not less important in instituting at Valencia a special jurisdiction charged with deciding maritime disputes, completing the institution the following year by the establishment of a tribunal of appeal[232] before which one could bring the sentences of the 'consuls of the sea.' These trials were to end more quickly than the others and all the judges were not in a position to understand them."[233] The gild of the *probi homines maris* were annually to elect, subject to the king's confirmation, two laymen to be consuls, "skilled in the art of the sea," and exercising functions purely judicial,[234] thus perfectly paralleling the development of the court in Pisa from a Gild.[235] It was further established, according to this same diploma of Peter III, "that the Consuls of the Sea should determine all contracts and disputes between 'men of the sea' and mariners according to the custom of the sea, as had been customary at Barcelona.[236] This is the furthest point to which any extant record carries back 'the custom of the sea' in any sense, in which it can be supposed to have been handed down to us amongst the chapters of the Consulate." [237]

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[230] Schaube, p. 250.

[231] Goldschmidt, pp. 206–207. "Allein 1282 begegnen doch 4 '*procuradores ó consules sobre negocios del mar*,' und 1301 ff., 1322 werden alljährlich von der Stadtbehörde 2 *consules del mar* erwählt; 1315 wird die Auslegung einer Verordnung dem Stadtrath von Barcelona und den *consols de la mar* überlassen. Endlich 1347 ergeht die königl. Verordnung, durch welche der Stadtbehörde von Barcelona auf alle Zeit das Recht verliehen wird, nach dem Muster der an Mallorca (d. h. ursprünglich an Valencia) ertheilten Privilegien, alljährlich *consules maris et iudicem eorum*, d. h. einen Appellationsrichter zu wählen. Damit tritt jedenfalls das *consulatus maris* von Barcelona schlechthin aus dem Kreise der Innungsinstitute heraus; es ist ein von der Stadtbehörde eingesetztes Seegericht und Seehandelsamt, welches auch bei der Ernennung der auswärtigen Consuln konkurrirt."

[232] The judge of appeals shall decide "secundum consuetudinem et usum inter homines maris," *Black Bk. of Adm.*, IV, p. 493, n. 1.

[233] Desjardins, p. 47.

[234] Mitchell, p. 57. Goldschmidt, p. 208.

[235] Schaube, p. 288.

The merchants and mariners of Valencia had a very considerable influence on the court, and this is one of its important features, for not only were the judges themselves drawn from these two classes, but also if there were reasonable grounds to doubt their impartiality in any particular cause, one or two assistants were furnished from among the prud'hommes of the sea gild, and finally in case of doubt as to the law on any point the consuls were advised by the merchants and mariners.[238]

Wherever, also, a sentence was to be given upon a demand in writing the consuls consulted the prud'hommes, and when the consuls of the sea did not agree with the merchants, the latter were to be followed where it concerned contracts. It will thus be seen that the influence of the laymen on the law was strong and continuous. The court's procedure was characterized at first by delays, but the ordinance of 1336 ordered the consuls to administer speedy justice,[239] and this was followed by the "judicial order of the court of the consuls of the sea," which established a summary procedure quite like that in use in the Italian Gild courts, a feature later copied by the English Admiralty Courts.[240] In this fashion the consular jurisdiction was first established in Valencia.

But, now that we have considered some of the legal and historical antecedents of the Consulate of the Sea, we must examine that document itself, a document of very great importance in the history of maritime law.[241] The Consulate itself is not a code established by public authority. M. Desjardins believes that it is impossible to establish or even to conjecture by what authority it was promulgated.[242] Its provisions are not couched in imperative terms; usages are stated, explained, or commented upon. It was first printed at Barcelona in the Catalan dialect in 1494,[243] but it is generally believed to date from about 1340,[244] and it is accepted as being of Catalan origin.[245] Sir Travers Twiss believes that it is a compilation and digest of the decisions made by the prud'hommes of Barcelona, and that the prevailing Amalfitan and post-Amalfitan usages were not followed here.[246] The view of Sir Travers Twiss is supported by Herr Goldschmidt, who also believes it to be a compilation.[247] It seems most likely that the precedents of the court at Barcelona would have been kept and would have been edited and digested from time to time. The very title page of the Consulate speaks of *les bones costumes de la mar,*[248] which would have been interpreted and developed for half a century or more, in the Maritime Court at Barcelona. So behind the edition of *circa* 1340, which was revised about 1370, there most probably lies an older, smaller, simpler collection, dating from somewhere near the middle of the XIII Century.[249] This earlier collection would be the one used in making the city laws of Tortosa in 1272, and is quite likely the customary law of the sea in use at Barcelona, which we have referred to as being in existence in and before 1283. That its various provisions may belong to different times and to diverse provenances would be a strong point in its favor.[250]

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[236] *Black Bk. of Adm.*, IV, p. 493, n. 1. "Terminent contractus et dissensiones inter homines maris et mercatores, quæ iuxta consuetudinem maris fuerint terminandæ." Cf. Goldschmidt, p. 209, n. 54.

[237] *Black Bk. of Adm.*, II, p. lxvi.

[238] Mitchell, pp. 58–59.

[239] Schaube, p. 245. Ordinance of King Peter IV, Oct. 21, 1336. "Vobis dicimus et mandamus, quatenus universas et singulas causas seu questiones . . . audiatis et easdem fine debito decidatis breviter, summarie et de plano, absque strepitu judicii et figura, sola faci veritate attenta, prout de usu et consuetudine maris fieri est assuetum."

[240] Mitchell, pp. 60–61.

[241] *Desjardins,* p. 60. "Aucun document n'égale en importance, pour l'histoire du droit commercial maritime, le *Consulate de la mer.*"

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[242] *Desjardins,* p. 60.

[243] *Black Bk. of Adm.,* III, pp. xxxiv–xxxv.

[244] *Ib.,* II, p. lxv. Desjardins, p. 61. "Mais il paraît plus probable qu'elle ne fut pas rédigée avant le quatorzième siècle, et nous nous associons, sur cette question si débattue, aux conjectures à la fois plausibles et prudentes de Pardessus." Pardessus, II, p. 26.

[245] *Black Bk. of Adm.,* III, p. xxxiv. "The arguments in favour of the Catalan origin of the Consulate of the Sea, are in the Editor's opinion overwhelming." *Ib.,* II, p. lxvi. "If it be further assumed, and the Editor . . . ventures to assume . . . that the Consulate of the Sea is of Catalan origin, and belongs neither to Marseilles nor to Pisa, as some authors have contended, but was so named because it contained 'the Chapters of the Sea,' which were followed, as rules for the settlement of maritime disputes, by the Consuls of the Sea at Barcelona." Desjardins, p. 61. "Ces raisons [que le Consulat est d'origine catalane] me semblant décisives."

[246] *Black Bk. of Adm.,* III, p. lxvi.

[247] Goldschmidt, p. 208.

[248] *Black Bk. of Adm.,* III, p. 50.

[249] Wagner, pp. 57–59. "Das Consulat der See. Die merkwürdige unter diesem Namen bekannte Sammlung von Seegebräuchen, deren Entstehungszeit man früher sehr weit zurückzuverlegen pflegte, ist, wie neuere Untersuchungen ergeben haben, in seiner gegenwärtigen Gestalt nicht vor der zweiten Hälfte des 14. Jahrhunderts (um 1370) in Barcelona entstanden. Zu Grunde liegt derselben eine ältere uns nicht erhaltene Sammlung, welche als Costumes de la mar schon früher citirt wird und von deren Inhalt wir eine Vorstellung gewinnen, wenn wir den Abschnitt der Costums von Tortosa IX 27 zu Rathe ziehen. Diese Sammlung, welche sicher schon in der zweiten Hälfte des 13. Jahrhunderts existirte und wohl eher eine Aufzeichnung von Gewohnheitsrecht als eine Präjudiciensammlung gewesen zu sein scheint, ist dann mehrfach ver-

It is divided into two main parts, of which the first is divided into three hundred and thirty-four chapters, and is sometimes known as the Consulate by itself. In the second part eleven documents, dating from 1340 to 1488, and readily distinguishable from the Consulate, are found.[251]

grössert und umgestaltet und endlich durch einen unbekannten Verfasser, wahrscheinlich einen Schreiber des Seegerichts von Barcelona, zu einem umfangreichen Rechtsbuche verarbeitet worden. Dem Verfasser waren nicht nur die Rechtsquellen des Mittelmeeres, insbesondere die spanischen, sondern auch namentlich die Rechtsgebräuche der französischen Westküste bekannt. Obwohl einzelne Theile des Seerechts im Consulat nicht behandelt werden, zeichnet es sich doch im Allgemeinen durch grosse Vollständigkeit und eine weit getriebene Casuistik aus. Dies führte dahin, dass das Werk einen weit reichenden, theilweise noch heute bemerkbaren Einfluss erlangte, der sich in doppelter Weise geltend machte, einmal dadurch, dass die Gesetzgebung aus dem Buche schöpfte, sodann aber besonders dadurch, dass dasselbe als Rechtsquelle von den Seegerichten anerkannt wurde. Das letztere wurde vermittelt namentlich durch die italienischen Uebersetzungen, welche auch in nördlichen Europa Verbreitung erlangten. Im Gebiete des Mittelmeeres geriethen sogar durch den grossen Einfluss, welchen das Consulat ausübte, die privatrechtlichen Bestimmungen der älteren Seerechte allmählich in Vergessenheit. Von dem Rechtsbuche in seiner gegenwärtigen Gestalt sind zwei Redactionen bekannt, welche übrigens nicht wesentlich von einander abweichen. Die eine Redaction enthält nur das Rechtsbuch, während in der anderen das Consularreglement für Valencia und zwei andere Verordnungen vorhergehen, auch ist eine Verordnung über die Ausrüstung von Caperschiffen angehängt. Der Text der ersterwähnten Redaction ist um einige Kapitel kürzer, namentlich enthält dieselbe an Stelle der cap. 109–113 zwei Artikel der Verordnung des Königs Peter IV von Aragonien vom Jahre 1340. Wir kennen diese Redaction gegenwärtig nur aus zwei italienischen Uebersetzungen, nachdem ein vor dem Jahre 1484 veranstalteter Druck in catalanischer Sprache, der noch dem *Capmany* vorgelegen hat, verschollen ist."

[250] Goldschmidt, pp. 208–209. "In der Praxis nun der Seehandelsinnung bezw. des Seegerichts von Barcelona hat sich der Komplex seerechtlicher Weistümer, *costumes de la mar* gebildet, welcher unter dem späteren Namen '*libro del consolat del mar,*' Consulat zur See, die weiteste, nahezu gemeinrechtliche Verbreitung über ganz Europa, vornehmlich in seiner italienischen Vulgatredaktion, gefunden hat. Die letzte Zusammenstellung mag etwa 1370 erfolgt sein, aber zu Grunde liegt eine ältere, sicher in die Mitte des 13. Jahrh.'s hinaufreichende und bereits in dem Stadtrecht von Tortosa 1272 lib. IX, tit. 27. benutzte Sammlung, wie denn auch 1283 die Geltung umfassenden Seegewohnheitsrechts von Barcelona urkundlich feststeht. Seine einzelnen Bestandtheile gehören verschiedenen zeiten an."

[251] *Black Bk. of Adm.,* II, p. lxi.

There follows an abstract of the first part, after M. Desjardins:[252]

(1) Respective obligations of the master, constructor, and share-owners, relative to the construction and sale of a ship.[253]
(2) Duties of the first mate, the clerk, and of the other employees.[254]
(3) Duties, as between the master and the mariners.[255]
(4) Documents, conditions, and obligations relative to affreightments.[256]
(5) Loading, stowage, and unloading.[257]
(6) Order of ships and of goods.[258]
(7) Anchorage of ships in roadstead, beach, or port.[259]
(8) Mutual obligations between masters, loaders, and passengers.[260]
(9) Of causes which can prevent a master or a loader from commencing or continuing a voyage.[261]
(10) Voyages in consort.[262]
(11) Running aground and other maritime accidents.[263]
(12) Injury caused to a merchant ship by enemies or by corsairs.[264]
(13) Respective obligations of masters and parties interested in ships.[265]
(14) Of the observation of agreements and of good faith in the purchase and sale of ships.[266]
(15) The *commenda* of ships and shares in ships.[267]

General opinion has been very favorable to the Consulate, and

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[252] Desjardins, p. 62.

[253] Chs. 2–11, 198–200, 227, 238.

[254] Chs. 12–15, 17, 205, 206.

[255] Chs. 79–138, 148, 178, 180, 181, 183, 193, 202, 222, 223, 228, 252.

[256] Chs. 41–47, 56, 57, 59, 60, 62–65, 143–145, 187, 189, 190, 208, 212, 213, 215, 224, 225, 236, 246, 248.

[257] Chs. 18–30, 141, 153, 154, 139, 140, 191, 192, 204, 229.

[258] Chs. 165–177, 210, 234, 235, 242, 244.

[259] Chs. 155–158, 161–164, 183.

[260] Chs. 16, 31–33, 68, 71–78, 179, 209, 214. The Consulate allows the *agermanament,* that is, an agreement by which all losses or all sacrifices from any accident whatever (consequently outside the case where jettison has saved the ship) give rise to contribution. See *infra,* p. 111.

[261] Chs. 35–40, 58–61, 139, 140, 146, 147, 149, 216–221, 233, 237.

[262] Chs. 48, 49, 241.

[263] Chs. 50–55, 66, 67, 142, 150–152, 188, 201, 207, 226, 232, 239, 250, 251.

[264] Chs. 185, 186, 203, 231, 243, 245.

[265] Chs. 184, 194–197, 211, 249.

[266] Chs. 247, 248.

[267] Chs. 173, 174, 242.

Pardessus praises it highly,[268] but on the other hand Mr. Ashburner criticizes it rather severely.[269] Yet it cannot be denied that the Consulate has had a tremendous influence, especially in Italy, where during the XIV and XV Centuries, most of the seaport cities acquired bodies of maritime law,[270] administered by special maritime consuls, and also in France.

> "The Customs of the Sea became known . . . in the chief maritime ports of the Mediterranean. They were introduced first of all into Valencia, then into the Island of Majorca, then into Sicily, then into Rousillon, all of which countries were under the sceptre of the kings of Aragon, before any version of them was printed at Barcelona. Within half a century after they were printed in the Book of the Consulate of the Sea at Barcelona they were translated into the language of Castile and of Italy. They were further translated into French before the conclusion of the sixteenth century, into Latin sometime in the seventeenth century, into Dutch at the beginning of the eighteenth century, and into German in the course of the same century." [271]

The mother and archetype of all the later maritime courts was the Pisan *Curia Maris,* which was the first to develop its administrative functions into judicial ones and was the outgrowth of the powers granted to the Pisan Maritime Gild.[272] Historically, this court is of the greatest importance, as it was the model after which the courts of Aragon, and therefore of Barcelona were framed either mediately or immediately, and, as we have seen,[273] it is not improbable that the Consulate of the Sea developed from the decisions of the latter court, which became a general commercial court like the Pisan court. And, as the powers of the court at Barcelona were quite similar to those of the other mediæval courts which copied it, it may not be amiss to set forth here its later grant of jurisdiction, taken from the *Black Book*,[274] and forming a part of "The Judicial Order of the Court of the Consuls of the Sea." This is the first treatise to be found in the second part of the Consulate,[275] and it dates from between 1336 and 1343, in which latter year Pedro IV of Aragon granted to the people of the city of Majorca the privilege that their consuls should follow the rules of procedure here laid down for the use of the consuls at Valencia.[276]

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[268] Pardessus, II, p. 1, n. 2. Goldschmidt is over-enthusiastic when he writes, p. 208, of "die weiteste, nahezu gemeinrechtliche Verbreitung über ganz Europa."

[269] Ashburner, pp. cxx–cxxi. "The Consulate of the Sea, unfortunately, is not in a state now to be of much help in the investigation of mediaeval maritime law. There is a great deal of it: it is very verbose. Every principle is laid down two or three times, always with some difference; and every rule is accompanied by elaborate reasons, mostly futile. It must be admitted that there is an ancient nucleus of custom, but the greater part of the work consists of ingenious suggestions by learned men, which were probably never practised by any mariner or enforced by any court. [!] No maritime code of the Middle Ages has such an air of unreality about it. Until it has been separated into its constituent parts, it must be used with great caution." And see *Black Bk. of Adm.* II, pp. lxv–lxvi, where Sir Travers Twiss suggests that it is a digest of the decisions made by the prud'hommes of Barcelona, which appear to have been reduced to writing at different times, and that the later chapters are amplifications and, in some cases, amendments, of the earlier chapters.

[270] On the other hand, some of the Italian cities apparently did not acquire maritime courts until an extremely late period, and Ancona on the Adriatic is an instance, Goldschmidt, p. 178. "Ancona hat, nach dem angeblich von 1397 datirenden Seestatut, auszer Hafenvorstehern (*capitanei portus*) mit einer auf Hafen- insbesondere Zollsachen beschränkten Kompetenz, auch *consules maris,* aber mit augenscheinlich sehr beschränkter Jurisdiction; die 1493 geordneten 3 *consoli del mare* haben ausschlieszlich administrative Funktionen."

[271] *Black Bk. of Adm.,* III, p. lxxiii.

Chapter XXII of the "Judicial Order" reads:

> "The consuls determine all questions which concern freight, damage to cargo laden on board ship, mariners' wages, partnerships in shipbuilding, sales of ships, jettison, commissions entrusted to masters or to mariners, debts contracted by the master who has borrowed money for the wants or necessities of his vessel, promises made by a master to a merchant, or by a merchant to a master, goods found on the open sea or on the beach, the fitting out of ships, galleys, or other vessels, and generally all other contracts which are set forth in the[277] Customs of the Sea."[278]

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[272] Desjardins, p. 39. "Le professeur allemand Adolf Schaube, qui approfondit en ce moment l'histoire du droit commercial en Italie pendant le moyen âge, rattache à la fin du douzième siècle la constitution des corporations de commerce autonomes et notamment de la ghilde maritime pisane, que exercèrent bientôt un droit de jurisdiction propre. C'est le conseil de direction de cette ghilde, pourvu d'attributions administratives, qui formait à Pise, d'après cet érudit, le 'consulat de la mer,' en outre investi de fonctions judiciaires maritimes."

[273] *Supra*, p. 82.

[274] *Black Bk. of Adm.*, IV, pp. 473–475. These rules were followed in the courts of Valencia, Barcelona, Majorca, and Perpignan by 1348. *Ib.*, IV, p. 451.

[275] *Supra*, p. 84.

[276] *Black Bk. of Adm.*, II, p. lxii. Schaube, p. 246.

[277] *Supra*, p. 77.

[278] Cited by Mr. Justice Story in deciding *De Lovio* v. *Boit*, 2 Gallison, 398; Federal Case, No. 3,776. Cf. *New England Mutual Insurance Co.* v. *Dunham*, 11 Wallace, 1. See *Black Bk. of Adm.*, IV, pp. 482–483.

Chapter XXXI contains the following further grant of jurisdiction:

> "The consuls of the sea have all ordinary jurisdiction over all the contracts which have to be determined according to the usage and custom of the sea, and which are declared, stated and specified in the Customs of the Sea."

Such was the jurisdiction of the court. The manner in which its decisions were to be made and the precedents which it was to follow were carefully laid down in Chapter XLI: [279]

> "The sentences which are given by the said consuls and judge, are given according to the written Customs of the Sea,[280] and in accordance with what is declared in the different chapters of them. And there where the customs and chapters are not sufficient, they give them upon consultation with the prud'hommes of the merchants and of the sea, that is, always according to the majority of the voices in counsel, regard being had to the persons who give their advice."

Most important of all is Chapter XXXVI,[281] establishing a summary mode of procedure, for this was adopted later in the English Admiralty Courts: [282]

> "The consuls, under the charter of our lord the King, have power to hear the plaints and questions which are brought before them, and to determine them duly, briefly, summarily and forthwith, without the noise or formality of a judgment, *solâ facti veritate attenta,* that is to say, looking solely to the truth of the facts, according as has been accustomed to be done after the usage and custom of the sea."

After this period the Sea Consulate began to broaden its field and to include a general commercial jurisdiction, like the later English Court of Admiralty. In 1394 it had become an official Bureau of Commerce,[283] and by 1401 [284] this change was complete and the court at Barcelona ceased to be solely for maritime affairs.[285] It now included a commercial jurisdiction as well, and that jurisdiction was very sweeping —"all civil cases arising out of mercantile transactions whether by land or by sea." [286] The court, beside the general name of *mercaderia, mercancia,* and so on, kept the special names of the *consules maris et consilium logiæ, logia maris,* or *lonja de mar.*

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[279] *Black Bk. of Adm.,* IV, p. 492–493.

[280] This is the earliest mention of *written Customs of the Sea.* Cf. the provision of Peter III in 1283, above, p. 81.

[281] *Black Bk. of Adm.,* IV, pp. 488–489.

[282] *Ib.,* IV, p. 451, n. 1.

[283] Schaube, pp. 252, 257.

[284] In this same year there was in existence a municipal bank for deposits and exchange, Goldschmidt, p. 210.

[285] Schaube, p. 289.

The frequent disputes with the royal courts over the matter of jurisdiction were regulated by many decrees.[287] The court made slow headway at first, but its sweeping jurisdiction was finally accepted. This same development also took place in Valencia, but at a slightly earlier period.

The consuls had other duties, also. All through the XV Century we see them corresponding with other Mediterranean powers, with the King of France, with Bruges, endeavoring to suppress piracy, to adjust reprisals, and to guard the interests of their merchants abroad.[288]

While the Consulate of the Sea contains many legal doctrines which certainly belong to the early legal development of the Middle Ages, there becomes apparent in Barcelona with special clearness the trend towards the legal and especially the codifying fixation of modern commercial usages, probably according to the model, and under the influence of, Pisan law. Thus the broker's ordinance for Barcelona of 1271, and the law for the trial of commercial cases in Valencia and in Barcelona, which were instituted contemporaneously with the Consulate, belong to extensive establishments of this sort. The law of marine insurance was first codified in Barcelona with great independence in 1435–1484; for the law of exchange and for the *commenda* one also finds important regulations.[289]

In the Mediterranean, then, in Flanders, and in the north of Europe, we have seen that before the middle of the XIV Century the law of the sea was administered upon a basis of custom and usage, in special courts governed by their own special rules, and guided and judged by prud'hommes and those learned in the actual ways of the sea.

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[286] Mitchell, pp. 62–63. Schaube, pp. 253–254. "Omnes causas civiles, provenientes . . . exquibuscunque actibus mercantilibus, ubicunque in terra et in mari."

[287] Goldschmidt, p. 207. "Es erweitert sich 1394 zu einem allgemeinen Handelsamt und spätestens 1401 zugleich zu einem allgemeinen Handelsgericht, behält aber, neben dem allgemeinen Namen *mercaderia, mercancia* u. dgl. auch den speciellen Namen der *consules maris et consilium logiæ* . . . bei. Die vielfach streitigen Jurisdiktionsgrenzen der Consuln und ihres *Consilium,* der 20 ('vint'), gegen die königlichen Gerichte sind durch zahlreiche Verordnungen geregelt. Aehnlich aber schon früher hat sich diese Entwickelung in Valencia vollzogen."

[288] Schaube, pp. 259–262. See Appendix II, *infra.*

[289] Goldschmidt, pp. 209–210.

Finally, there follows as brief a statement as possible of some of the most important principles of mediæval maritime law.

THE PARTIES TO THE MARITIME ADVENTURE

"The mark of the mediæval as opposed to the Roman system is its fluidity. No category is clearly defined. Whatever class you belong to, you are constantly found performing the functions of another class. As a rule the ship is divided among a number of owners. . . . There is as a rule no distinction between the owner or owners of ship [sic] and the exercitor. It was evidently not the custom for the owners to let the ship out to some third person to run on his own account. . . . But as a rule joint owners undertake themselves the administration and navigation of their ship. By a majority in interest they appoint a manager . . . generally one of themselves, probably as a rule that one who has the largest interest in the concern. . . . Other joint-owners, probably the majority of them, go as mariners. . . . Where the ship had a single owner he often managed it himself. . . . Whether the manager of the ship was the agent of many or of one, his powers were in substance those of the Roman magister navis. He collected the receipts of the ship, paid its outgoings, and handed over the balance to the owner or owners. He had in case of necessity a power of borrowing on the credit of the ship, or even of selling it. . . . An important character of whom there is no trace before the middle ages, is the scriba scriptor or scribanus.[290] Many statutes prescribe that every ship shall have a scribanus . . . [he] is sworn before the public authority. . . . In some cases he is examined by the court as to his qualifications. . . . He had a book (quaternus, quaderno) in which he was obliged by law to enter the following, among other, particulars. (1) He kept a list of all the cargo, identifying the goods by their distinctive marks, if any, and he was often obliged to give a receipt on demand to each owner of cargo for the goods which belonged to him.[291] (2) He kept a list of the mariners, noting the day when their service commenced, and entered all agreements between them and the shipowner. (3) He entered the charter-party and all subsidiary agreements between shipowner and merchants. In some legislations the scribanus, on returning from a voyage, had to hand over his quaternus to the public authority to keep. Faith is to be given to the quaternus. . . . All writings made by the scribanus, whether in his quaternus or on separate slips of paper, had the authority of public instruments. Originally, no doubt, the scribanus was merely an accountant who relieved the patronus of the clerkly part of his labours . . . he soon assumed an independent position, and . . . was intended by the statutes to hold the balance between the shipowner on the one hand and the merchants and mariners on the other. This is clearly stated in the summary of his duties given in the Consulate of the Sea, c. 12–15."

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[290] See the discussion in Schaube, pp. 92–94. Also see Goldschmidt, pp. 152–153, 181–182, 301. The ship's scribe also had notarial powers.

[291] Ashburner, pp. cxxxv–cxxxviii.

In general the shipowner was not liable for the negligence and torts of the captain and of the crew, although committed in the course of their employment, collision being somewhat of an exception. At a quite early period one meets with the distinction between property at sea and on the land and the limitation of the liability of the other partners in the ship.[292]

DANGERS AND DIFFICULTIES OF NAVIGATION

1. Dangers from ignorance and want of discipline

"There was very little difference, as regards knowledge of navigation, between the different persons on board ship. Scientific knowledge there was none; and in point of experience everyone was on much the same level. It was not merely that there was little difference between officers and crew. The merchants had often made many voyages accompanying their goods, and were as well qualified to give an opinion in matters of wind and weather, of coasts and harbours, of shoals and quicksands, as the oldest mariner on board. The inevitable result was that in times of emergency every one did give an opinion, and that the movements of the ship were decided upon in the last resort by a majority. Some legislations attempt to check, or at least to regulate, this tendency to anarchy by providing a committee of navigation—a sort of representative body . . . [having] entire control of navigation." [293]

Chapter II of the Rolls of Oléron [294] required the captain to consult with the crew about the weather, before sailing. From the XIII Century onwards lighthouses and coast-guards began to be maintained at certain places.[295]

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[292] Goldschmidt, pp. 339–340. "2. Dasz der Rheder, über das römische Recht hinaus, für alle in Ausführung der Dienstverrichtungen begangenen Delikte von Schiffer und Mannschaft haftet, ist nicht ein Satz des romanischen Seerechts, wenngleich in dem wichtigen Falle der Schiffskollision annähernd das gleiche praktische Resultat sich findet. Andererseits begegnet schon früh die grundlegende rechtliche Sonderung des Seeguts von dem Landgut und die auf das erstere beschränkte Haftung mindestens des nicht selbst kontrahirenden Rheders bezw. dirigirenden Rheders."

[293] Ashburner, p. cxli.

[294] *Black Bk. of Adm.*, II, pp. 211–213.

[295] Schaube, pp. 119–120.

2. Closing of the sea in winter

"The mediæval system inherited from the Roman the custom of lying up during the winter months. . . . What in Roman times was a rule of prudence became in the middle ages a rule of law. The Pisan Constitutum Usus lays down (Ch. XXVIII) that, if a ship is in harbour after the kalends of November, the owners are not to leave before the kalends of March, without the consent of the merchants who have goods on board or of the majority of them. . . . Where a ship fails to leave at the prescribed time, and is compelled to winter on the way, the mariners are entitled to their full pay during the winter. . . . There are similar prohibitions in the northern legislations as late as the fifteenth century." [296]

3. Dangers from pirates, corsairs, robbers, reprisals, etc.

"In the mediæval documents the words corsair and pirate are often used indifferently. . . . The indiscriminate use of the two words points to a close similarity in the characteristics of the two classes. It is true that in law there was a distinction. . . . It must have been at least as difficult for Pisa or Genoa to keep their corsairs within the bounds of legality [297] as it was for the British Government in the eighteenth century to keep their privateers within the terms of the strict instructions which were given them when war broke out.

"The mediæval system of reprisals added another danger to travelling. . . . In the mediæval statutes the matter [of carrying weapons on board] is dealt with as follows:—(a) Some statutes require the ship to carry weapons, their number and character varying with its capacity. (b) Others require the nauclerus [captain] and mariners to carry arms. . . . (c) In some cases the merchant is required to carry arms. (d) No statute . . . requires the ship to carry men-at-arms, but it was customary to take them. Many merchants, say the Consulate of the Sea (c. 78), would not sail unless they knew that men-of-arms were on board. Hence we get provisions in charter-parties to [that] effect.

"A sailor sent ashore on the service of his ship and robbed or captured . . . is to receive his wages while he is in captivity, and . . . his losses are to be made good or his ransom paid by those for whose benefit he was sent—the communitas navis or the shipowner. . . . If merchants are afraid of being captured in a place, the shipowner is not to go there without their consent.

"Alterations [of the voyage] may have been sometimes necessitated by commercial reasons. But in most cases these changes had to be made, as the Statute of Spalato expresses it 'propter timorem cursariorum et malorum hominum.' Hence it is constantly provided in statutes and charter-parties that the majority of merchants on board are to have the power of altering the destination of the ship.

"Another result of these dangers was that the ships which went from

[296] Ashburner, pp. cxlii–cxliii.

[297] For a particularly flagrant case see Schaube, pp. 4–8.

Italian ports on commercial expeditions went generally in batches. . . . In addition . . . two or more ships might agree to take a voyage together and afford each other support. This arrangement was called *conserva* or *conservagium*—a word which seems to have come into use not before the thirteenth century. . . . The arrangement between the ships might extend to more than mere support. It might be in substance a partnership. C. 21 of the [Rhodian] Sea-law appears to give the first hint of such a partnership. . . . Where ships are put in conserva and under the orders of a capitaneus, then, if any loss happens by corsairs, it is spread equally over all the ships and their cargo. In the . . . Table of Amalfi (c. 38) conserva is expressly described as equal to societas. If one of the ships is wrecked, says the table, or is captured by pirates, 'tunc, sicut lucrum erat commune, ita esset damnum.' "[298]

The statutes of Bayonne give the rules of such a partnership.[299]

4. Food and Drink

"The merchants and passengers take with them their food, wine, and cooking utensils (Consulate of the Sea, cc. 30, 63, 76). . . . The amount . . . [they] might take without paying freight is often restricted. . . . Water for merchants and passengers as well as for crew was supplied by the ship (Consulate of Sea, c. 71). A new system came in with the growth of the pilgrim traffic. The Marseille system may here be taken as a specimen. The business of transporting the pilgrims[300] was in the hands of cargatores, who may be compared with a tourist-agency. They were bound to supply food for the pilgrims—'victualia bona et incorrupta et sufficiencia'—and not to enter into any partnership with the shipowner in reference to the supply. . . . With merchantmen the problem so far as regards food was easier. Cargo-ships did not as a rule take long voyages in the open. They hugged the coast and put in from time to time. At these stoppages it was often possible to revictual. The water question was much more serious. . . . Under the Barcelona Ordinance of A. D. 1258, c. 3, the shipowner is to keep a supply of victuals to last for fifteen days."[301]

THE SHIP

There were two chief types, the round ship, propelled mainly by sails and used exclusively for cargo, and the long ship, known as the galley, propelled mainly by oars, originally a military ship, but used in and after the XIII Century for the transport of goods and passengers, because of its speed.

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[298] Ashburner, pp. cxliii–cxlix.

[299] Above, p. 61.

[300] Goldschmidt, p. 344. "5. Der Passagiervertrag ist, insbesondere im Hinblick auf den Massentransport der Kreuzfahrer, Wallfahrer u. dgl. genau geregelt."

[301] Ashburner, pp. cl–clii.

> "The total capacity of the ship was no doubt ascertained by calculations made when it was measured . . . before the ship left the yard. Various enactments provide maxima and minima of length, breadth, etc., and it is obvious, even where it is not stated, that obedience to these provisions could only have been insured by an official examination of the ship. . . . The Mediterranean codes never refer . . . to a fixed proportion between the capacity of the ship and its value: they provide, however, for its being valued." [302]

Eight hundred tons of cargo was not an unusual load.[303]

"Mediæval ships apparently did not have names till nearly the thirteenth century." [304] Heyd [305] mentions a vessel named "Le Demi Monde" in 1142 or 1143 and, in 1197, two vessels named "The Eagle" and "The Imperial." [306] There was an official inspection to see that the ship was seaworthy and that she was properly loaded, and this was one of the characteristic differences between Roman law and mediæval Romance law, and has become part of our modern law.[307]

> "1. The Venetian statutes contain various provisions which in substance limit the places where cabins may be made, prescribe the use to which certain cabins are to be put . . . and require spaces to be left free for storerooms. . . . 2. The ballasting is sometimes done by the navigating officer, who may be sworn by the merchants to ballast with a view to the ship's safety. . . . 3. There are many enactments prohibiting heavy goods from being placed in various parts of the ship. . . . Where these provisions are transgressed by the merchant without the shipowner's knowledge, the shipowner is not liable in case of loss or damage for goods improperly placed and the merchant has no right to contribution where they are jettisoned. . . . 4. As a rule the packing of the cargo in the hold is left to the discretion of the nauclerus and the stevedores, who are bound to pack with a view to the safety of the ship. 5. The provisions against overloading are generally based on this principle. A mark is placed on the outside of the ship. Then the ship is officially examined after it has been loaded and before it sets sail. The mark must not lie more than a certain depth below the water-line. The depth at which it is allowed to lie varies with the ship's age." [308]

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[302] *Ib.*, pp. cliii–clv.
[303] Heyd, I, p. 324.
[304] Ashburner, p. clv; Goldschmidt, p. 338.
[305] Heyd, I, p. 408.
[306] *Ib.*, I, p. 316.
[307] Goldschmidt, pp. 338–339.
[308] Ashburner, pp. clvi–clviii.

JOINT OWNERSHIP OF A VESSEL

"The mediæval statutes are filled with provisions for bringing about and enforcing this agreement [between co-owners] and regulating its terms in order to prevent the oppression of a minority . . . in the thirteenth century there seems to have been no fixed principle of division with regard to the ships of any state. The ship was divided merely with a view to the immediate convenience of the owners. . . . No restrictions seem ever to have been put upon the right of a co-owner to deal with his own share. He might, so it seems, sell or pledge his share without the consent of his co-owners, except in so far as they might have a preferential right of purchase.[309] . . . The general principle is that the majority in interest of the owners have full power of dealing with the ship, subject to their acting in good faith. As a rule notice has to be given to all the owners before any important step is taken, and some acts can only be legally effected under the superintendence of the Court having jurisdiction. The provisions fall under the following heads:—(1) The majority . . . appoint the manager. A co-owner who has sufficient technical knowledge has a preferential claim to be appointed. . . . We often find cases where one owner receives the shares of the others *in commenda*. No doubt this was found a convenient expedient for giving the managing owner a power of disposition over the shares of the others, and for relieving persons who dealt with him from the necessity of inquiring into the extent of his authority. . . . (2) The majority of the owners may incur necessary expenditure on the ship, and may for that purpose charge the whole ship, including the shares of dissenting members. . . . As the majority of the owners do it, so may their agent, the manager, do it. (3) The majority of the owners may let the ship. (4) Sometimes any joint-owner, and in any event a majority in interest, can insist on the ship being sold. The sale takes place by public auction, and generally under the direction of the Court. Any joint-owner may bid. Notice of the sale is given, and absent parties are bound. The sale is made subject to any existing charter-party. A sale by the court sometimes has the effect of extinguishing claims of creditors as against the ship and transferring them to the proceeds of sale." [310]

When a ship has left the home port the managing co-owner exercises the general authority of the other co-owners, but it ought to be in accord with their directions.[311]

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[309] Goldschmidt, p. 340, n. 29.

[310] Ashburner, pp. clxiii–clxvi.

[311] Goldschmidt, pp. 340–341. "3. Die Rhederei—auch die Baurhederei—bildet ein eigenthümliches Societätsverhältnisz. Die Schiffsparten—häufig nur Nationalen zugänglich—sind veräuszerlich und vererblich. Es entschiedet die Mehrheit, doch gilt vielfach Setzungsrecht und Abandonrecht. Die Haftung der Mitrheder besteht vielfach nur nach Parten. Eine gesetzliche Vollmacht der Rheder, für einander (bezw. über ihre Part hinaus) zu kontrahiren, besteht nicht.

THE MARINERS

"The Ordinamenta of Trani allude both to the mariner at a fixed wage (Ordin. 1, 3) and to the mariner *a parte* (Ordin. 10, 12), [who was paid an aliquot part of the profits instead of wages]. . . . The original form at Amalfi . . . was a system of partnership between ship, cargo and crew. In the fourteenth century the three systems existed side by side. . . . The Consulate of the Sea recognizes hiring by the voyage (c. 84, 116) or by the month (c. 85) and sailing upon shares (c. 202, 203). . . . A mariner, however hired, who fell ill during a voyage was left behind, was entitled to his wages up to the time of his leaving the ship, and to a small payment per day for a month." [312]

The seaman was sometimes permitted to carry free a certain amount of goods for his own account.[313] Members of the crew might not sue one another in a foreign port.[314]

"The enactments which deal with the mariner's duties [315] may be arranged under the following heads:— 1. The mariner's duties are not necessarily confined to the actual voyage. . . . From the moment that the engagement was entered into, the mariner had to hold himself in readiness. . . . 2. As a rule the loading and unloading of cargo is not among the mariner's duties [unless there are no stevedores] (Consulate, 29, 110, 135, 136). . . . 3. In some statutes the mariner is bound to take an oath on making his engagement (Consulate, 16, 109). . . . 4. The mariner during the voyage must obey the person in command (Consulate 117). 5. The mariner must not go on shore (Consulate, 121) or sleep on shore (Table of Amalfi, 56; Consulate, 129) at intermediate stations without the consent of the person in command, [who] . . . can only give leave to a limited number. A certain proportion of the ship's company must always remain on board. . . . 6. Where there is a shipwreck the captain and the sailors are to help in salving . . . [and] remain by the ship [for a certain time]. (Ordin. Trani, 1). . . . 7. Several statutes lay down the conditions under which a mariner may leave after he has engaged himself (Ordin. Trani, 11: Table of Amalfi, 41; Consulate, 110, 111). . . . 8. Several statutes give a list of the offences for which a mariner may be dismissed [disobedience, theft, perjury, quarrelling, blasphemy, debauchery] (Trani, 9; Consulate, 80). . . . The absence of discipline on board the mediaeval merchantman has already been referred to." [316]

"Der Korrespondentrheder, ursprünglich mitfahrender Dirigent der Seefahrt, pflegt später vom Heimathshafen aus die Weisungen zu ertheilen, während gleichzeitig die Schiffsgewalt und das Vertretungsrecht des Schiffers (noch nicht für die Ladungsinteressenten, aber doch für die Rhederei) sich erhöhen. Vor fremdem Gericht darf der Schiffsmann den Schiffer nicht belangen."

[312] Ashburner, pp. clxxii–clxxiv.

[313] *Ib.*, p. cclxxiv.

[314] Above, p. 95, n. 311.

[315] The Pisan regulations are set forth in Schaube, pp. 94–96.

[316] Ashburner, pp. clxxii–clxxviii; and see above p. 91.

TRANSPORT OF GOODS

Following is the substance of a mediæval charter party made at Pisa on August 10, 1263.[317] The parties are three shipowners and four merchants, acting for themselves and for other merchants. The shipowners will provide the ship in good condition and furnished with the tackle specified in the charter-party, 36 skilful mariners properly armed, including the captain and scribe, and 6 servants, and they will set sail from Porto Pisano within 10 days from the date of the contract, first receiving the cargo and loading it on board, providing, also, at their own expense, lighters to bring the cargo from Pisa to the ship. Further, before sailing, the shipowners will make their partners, the sailors, the stevedores, and the captain take oath to keep the contract. The cargo will be carried at the customary rate, no freight being charged for the merchants, their partners, or their personal goods. When the ship has reached Bugea, the shipowners will put the cargo on shore and hand it over to the merchants "per apertum scriptum" as they received it. The shipowners will not carry on board goods exposing the cargo to confiscation. Within 10 days after arrival at Bugea the shipowners will begin to load and will load the cargo received up to 2,500 cantaria. Each merchant will provide so much. The third deck and the upper poop are to remain free for them and their personal goods. Freight is paid *per cantarium*. The cargo is to be brought to the ship at the merchants' expense. The shipowners will stow and load it properly. They will receive it on board "per apertum scriptum," weighing it at their expense (the weigher being appointed by the parties) and entering it in the ship's cartularium, by the scribe. The scribe, captain, and camerarius are to swear upon the evangels to maintain the ship, its tackle, and cargo. Wool or sheepskins compressed beyond a given amount in stowing the cargo, pay less freight. As soon as the cargo is loaded the shipowners will return, unloading the cargo at Porto Pisano at their expense. They will not demand average for any part of the ship's tackle during the voyage out or in, nor will they demand freight except for goods delivered to the merchants at Porto Pisano. If a mariner is missing on the voyage, the shipowner will recover him without average; and they will do the same if part of the tackle is lost or injured. They will ensure that three-fourths of the mariners and the captain remain by the ship until it is completely unloaded and will have the merchants' goods entered in the ship's quaternus and will restore them per scriptum. The shipowners will make the whole voyage directly. They will not deviate nor make any other voyage nor take any cargo (except so far as there is room on board) until the cargo loaded at Bugea has been brought back. They swear to observe these terms, except so far as they are presented by just impediment of God or tempest or except so far as the merchants excuse them. If they fail they are liable to a penalty of double and to damages. The merchants agree to deliver the cargo within the prescribed time, and to pay the agreed freight in currency, gold or silver, within eight days after unloading and the delivery of the cargo to them or their agents, to the shipowners or their agents or to one of them, or to the ship's camerarius, any such payment being a discharge. If cargo is delivered before payment, a *cautio* of a bank is to be given for payment. The merchants will observe these terms subject to the just impediment of God or tempest or to a concession made by the shipowners. If they fail they are liable to a penalty of double the freight and damages.

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[317] Mas Latrie, *Traités,* pp. 38 *et seqq.* For a shorter charter party of 1251, see *ib.,* p. 122. Another, of 1373, is given by the same author at p. 128.

Under the mediæval system the ship had to be well caulked, and charter parties regularly provided that the ship should have a certain number of masts, sail yards, anchors, anchor cables,[318] and mariners. Statutes, where they deal with these matters, prescribe heavy penalties where there is any defect.

The copy from the ship's book which the scribe gives to the merchant is the *apertum scriptum*. One begins to find, at this time, true transportation contracts, where the consignor and consignee are different persons. In the XIII Century one begins to meet independent bills of lading of the captain or of the shipowner, having the character of negotiable instruments,[319] and Professor Bensa has published the texts of several, the earliest being dated June 25, 1390.[320]

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[318] Ashburner, pp. clxxxiii–clxxxvi.

[319] Goldschmidt, pp. 341–343, and original documents there cited. "4. Im Frachtvertrage, welcher sowohl als Chartepartie wie über Stückgüter vorkommt, sind die strengen Grundsätze des römischen *receptum* noch nicht allgemein durchgedrungen. Dagegen hat sich der Frachtvertrag, da die Ladungsinteressenten nicht mehr mitzufahren pflegen, zum Distanzablieferungsgeschäft (Verschiedenheit von Ablader und Empfänger) ausgebildet. Die an Schiffsbord befindliche Urkundsperson (Schiffsschreiber oder Schiffsnotar) verzeichnet die an Schiffsbord gebrachten Güter in dem Ladungsverzeichnisz . . . und ertheilt aus diesem dem Ablader Kopie . . . Doch begegnen bereits im 13. Jahrh. unabhängig von dem Ladungsverzeichnisz, selbständige Ladescheine des Schiffers bezw. Rheders, welche durchaus den Character der Werthpapiere tragen . . ."

There were various ways of determining the freight:

> "(1) The ship might be let as a whole for an aggregate price and either for a voyage or by the month, or the merchant might arrange with the shipowner to carry certain specified goods at a fixed price. (2) In some cases goods were charged a percentage of their value for freight. This applied chiefly to goods of great value in small compass. . . . (3) In some cases payment was made in . . . so much of the cargo carried. (4) In most cases a merchant who hired a ship or part of a ship could not tell beforehand what goods he was going to load on board. This was especially the case where goods were to be loaded abroad. Everything depended on the turn of the market. All the merchant could do was to take either the whole ship or so much space on board for the carriage of his goods. The capacity of the ship or the space so taken was reckoned in certain ideal measures, and the merchant agreed to pay so much for every unit of the measure in question which he took. . . . In mediaeval charter-parties and maritime codes . . . the capacity of a ship is always stated in the terms of measures which on land are measures of weight. . . . The difficulty [of reconciling cubic capacity with weight] is got over in the statutes by elaborate tables of equivalence. . . . The capacity of a ship for cargo was originally determined by the quantity which it would hold of the commodity which formed the staple export from the ship's home port." [321]
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> "The charter-parties present wide diversities as to the times at which and proportions in which freight was payable. No doubt credit and reputation of the hirer accounted in great measure for these diversities. Crusaders seem to have been looked on with suspicion. . . . (1) A proportion, not always half, is paid at or before the beginning of the voyage and the remainder at the end. . . . (2) Sometimes the whole is made payable on the execution of the contract or at least before the departure of the ship. . . . (3) The cases are much rarer where nothing is to be paid until the expiration of the voyage.[322] . . . The shipowner's default in certain cases relieves the merchant from his liability to pay freight. (1) If the shipowner agrees to take goods which he cannot carry, he is bound not only to restore any freight which he has received . . . but also to pay the merchant the difference between the freight [agreed upon] and the freight which the merchant has in fact been obliged to pay. (2) The shipowner's contract to carry the freight is [prima facie] a contract to carry it to the journey's end." [323]
>
> "The reciprocal obligations of the merchant and shipowner with respect

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[320] *Le Forme Primitive della Polizza di Carico,* p. 8.

[321] Ashburner, pp. clxxxix–clxxxxi.

[322] For unpaid freight there was early a possessory lien on the transported goods: later they were considered as pledged. Consolato, Ch. 225. *Black Bk. of Adm.,* III. pp. 513–521. Goldschmidt, p. 302.

[323] Ashburner, pp. cxcv–cxcvi.

to unloading varied with the provisions of the charter-party, and, in default of such provisions, with the custom of the port. The shipowner is under the obligation of delivering the cargo to the merchant and the merchant of taking delivery; but there was naturally no uniform practice as to where delivery was to be made. When the goods were taken off the ship in lighters (c. 83, Breve Curiae Maris of Pisa), as was generally the case, the merchant seems to have been obliged as a rule to provide the lighters, and to bring them to the ship; while the shipowner was under the obligation of bringing the goods from the hold and loading them on to the lighters[824] (Ordin. Trani, c. 17)."

"Some statutes speak as if the shipowner's obligation [to restore the merchants their property at the end of the voyage] was absolute provided that the goods have been written by the scribanus in his quaternus or cartularium. . . . In other statutes the shipowner is excused in case of violence, fire, tempest or jettison. . . . Many statutes lay down that, if any damage arises to cargo through bad (caulking), the shipowner is liable unless he can prove that the damage arose through the storm. . . . Others more correctly lay down that, if the cargo is damaged by bad (caulking), the shipowner is absolutely liable. Others again lay down that where cargo is injured by water the shipowner is liable; but most add that he can relieve himself from liability by proving that it was wetted in putting out a fire or through storm. . . . Some statutes also impose a liability upon the shipowner for injuries done to merchandise in the process of loading and unloading it. . . . The captain is not responsible for [personal] effects of a passenger unless they have been deposited with him; but the captain, sailors and possibly the other passengers are to clear themselves by oath."[825]

"Breaches of Contract. . . . The shipowner has the ship ready at the appointed place and time. The merchant, without reasonable excuse, fails to load it. He is liable to pay the whole freight; but if the shipowner succeeds in letting the ship, the merchant is only liable to pay the difference, if any, between the freight which he agreed to pay and that which the shipowner actually got (Const. Usus, c. 28). If the contract provides a penalty, the merchant must pay that so as it does not exceed twice the agreed freight. The merchant is also liable for failure to load if the shipowner, although he is not at the appointed place at the appointed time, is there at a reasonable time thereafter. By reasonable time is meant such a time as will enable the merchant to bring back his cargo before the ensuing winter. . . . A shipowner who agrees to have a ship at a certain place by a certain time fails, through wilful default, to reach the place at the time. If the contract contains a penalty, the shipowner must pay it up to the amount allowed by law. If there is no penalty, he is liable in damages to the merchant. . . . What constitutes a iustum impedimentum [relieving a party to the contract from liability for failure to carry out its terms] must depend on the circumstances, and the definitions which are sometimes given in the statutes cannot be extended beyond the particular case to which they are applied." [326]

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[824] *Ib.*, p. cxcvii.

[825] *Ib.*, pp. cxcviii–cci.

MARITIME LOANS

"A maritime loan—in the jurisprudence of Greece, Rome and the Middle Ages—was a loan made to a shipowner, or a merchant trading at sea, and made for the purpose of the maritime adventure. It was made, e. g. to build or buy or repair a ship, or pay seamen's wages, or buy a cargo to be put on board ship, or meet expenses connected with the cargo. Now the material on which the loan was expended, the ship or the cargo, was necessarily subject to a maritime risk, and, as a rule, the borrower was not in a condition to repay the loan until the maritime risk had been run, and the ship or cargo or that into which the cargo had been converted was safe at home. If a man borrowed money to build, buy, or repair a ship, he could not, as a rule, repay the loan until he had sold the cargo. Whether from kindness to the borrower or from some other reason, it was settled that in a contract of maritime loan the lender took the maritime risk; and this is the leading distinction between a maritime loan and other loans. Although the terms in which the loan was expressed remained substantially the same from the age of Demosthenes till the thirteenth century, there are differences in the wording of the documents, which do not necessarily imply corresponding differences in the legal effect of the transaction. . . . In the mediaeval documents the loan is generally expressed to be repayable if the ship, or if the ship and the greater part of its cargo, arrives safe. There is sometimes, but not normally, a specific hypothecation.[327] In the documents, therefore, the loan often resembles an ordinary loan upon a contingency,[328] and there is evidence that both in antiquity and the middle ages the forms of a maritime loan were made use of for contracts which were purely aleatory.[329] . . . If ship or cargo,

[326] *Ib.*, pp. cci–ccix.

[327] True bottomry was not yet known. Goldschmidt, p. 348. "Wie nach griechisch-römischem Recht ist es an sich Kredit-geschäft mit bedingter Pflicht zur (Rück-) Zahlung von Kapital und Prämie (Zins); ist die Bedingung (*salva navi, sana eunte navi* bezw. *merce*) eingetreten, so sind Kapital und Prämie zu zahlen, mag auch durch einen späteren Unfall das in der Regel zugleich verpfändete Objekt (Schiff, Ladung) untergehen; eine blosze Pfandhaftung (Bodmerei) besteht an sich nicht."

[328] The following was the general form in use in the middle of the XII Century: "Ego rader gener georgii profiteor me accepisse a te johanne anterio libr. 6 den. ian. de quibus promitto dare tibi vel tuo misso libr. 8 den. ian., navi in quo vado sana eunte alexandriam et inde redeunte, ad mensem unum postquam venero." The ship was often specifically designated, if it was not identified as the one in which the merchant himself would travel. The risk was generally for an outward and return trip, but the returning ship was frequently not specifically designated. Goldschmidt, p. 349, n. 57.

[329] Goldschmidt, pp. 346–347. "9. Das aus dem Alterthum wesentlich unverändert, ohne die Justinianische Zinstaxe, übernommene Seedarlehen . . . wird zwar in 13. Jahrh. in Konsequenz des Wucherrechts, als verzinsliches,

> as the case might be, perished during the voyage, the lender not only lost his right to recover the amount secured out of ship or cargo; he also lost all other rights against the borrower in respect of the loan." [330]
>
> "The mediæval doctrine of maritime loans is complicated by the ecclesiastical prohibitions against taking interest.[331] These prohibitions [be tween 1227 and 1234] were extended to the case where the lender took the maritime risk.[332] The thunders of the church did not affect the actual course of commerce. In the commercial cities of Italy and Southern France, interest was regularly taken on loans, even though the loan was unconditionally repayable, and the rate was as a rule much higher than in classical times. The only effect of the ecclesiastical prohibitions was the adoption of various conveyancing devices which cloaked the real nature of the transactions involved. . . . The documents distinguish on their face the *mutuum,* the *permutatio* or *cambium,* the *emptio,* the *commenda* —called in Venice *collegantia*—and the *societas.*[333] These various classes of contract have many characteristics in common; they are probably all derived, either in whole or in part, from the ancient maritime loan; the great difference is that while in the first three the person who has the management and control of the fund pays for its use a sum fixed at the execution of the contract, in the last two he pays a proportion of the profit which he makes out of it." [334]

The maritime loan soon found an analogous application to commerce on land and thus, through an ever wider development, became a general loan business conditioned upon safe arrival.[335]

> "The amount of the loan [in the *mutuum*] is sometimes stated in money, sometimes it is left vague. . . . The borrower sometimes promises to repay a fixed sum, sometimes to repay the amount lent with interest. . . . There is sometimes a provision raising the rate of interest if payment is delayed. . . . There are sometimes provisions for repayment of the loan if the borrower or his ship does not start before a certain date." [336]

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mithin überhaupt von der Kirche verpönt, erhält sich aber gleichwohl in der Praxis der Seestädte als das neben der *commenda* wichtigste Spekulationsgeschäft, mitunter societätsmäszig modifizirt . . . Das beweisen nicht allein die statuarischen und sonstigen Quellen . . . sondern vornehmlich die zahlreichen, bisher nur wenig benutzten . . . Urkunden"—Genoa of the XII and XIII Centuries, Marseille and Armenia-Cyprus of the XIII Century, see n. 53, p. 346. See also *ib.*, pp. 239, 314, 413.

[330] Ashburner, pp. ccix–ccxii.

[331] Goldschmidt, p. 141.

[332] *Ib.*, p. 346, n. 52; p. 138, n. 159.

[333] See generally Lefort's Introduction to the French edition of Bensa, pp. vii–viii.

[334] Ashburner, pp. ccxxiii–ccxxiv.

[335] Goldschmidt, p. 347. And see Huvelin, p. 16.

[336] Ashburner, pp. ccxxiv–ccxxv.

"The forms of the *emptio* or the *permutatio* were sometimes adopted to cloak a transaction of loan and evade the canon law. In an ordinary maritime loan the money lent was as a rule applied by the borrower in the purchase of goods, and the repayment of the lender depended upon the safe arrival of those goods or the goods into which they had been converted. This transaction may be put in another way. Instead of B buying goods with money lent by A, A buys the goods himself and sells them to B, and the price which B agrees to pay will be (a) payable at a future date; (b) contingent upon the safe arrival at the place of payment, either of the original goods or the goods into which they have been converted; and (c) sufficient to meet the sum paid by A with maritime interest."[337]

"*Permutatio* or *cambium* is this. If B receives coins from A on the terms of paying coins of a different character at a later date this is merely exchange, like the exchange of wheat for mutton, and there is no taint of usury in it, although the coins returned may be of much greater value than the coins received. *Permutatio* or *cambium* might be made use of not merely where the loan was made repayable in a foreign port and where it would naturally be repayable in the currency of that port, but also where the loan was repayable in the home port.[338] The variety of currencies which circulated in every trading centre made this easy."[339]

"In all cases of loan there is generally a short interval between the cesser of the maritime risk and the day fixed for payment. . . . The borrower sometimes has the option of anticipating payment under discount. . . . Where the loan is to be paid in an out-port, it is sometimes made payable to the lender or a third specified person, sometimes to the lender or his nominee, sometimes to the lender's agent ('nepoti tuo pro te recipienti'). Where there is no one at the out-port who can give a discharge, the borrower promises to invest the money due in specified goods. In some cases the borrower has the option of deferring payment till the return home. . . . In most cases the contingency is put frankly as a contingency, *salva eunte et redeunte*. . . . It is evident that the mediaeval contract of maritime loan was identical in its main features with the classical contract."[340]

THE MEDIÆVAL COMMENDA

The *societas* and the *commenda,* of which we shall next speak, were the business contract forms most preferred by the mediæval merchant.[341] They are not without interest to the student of American law, and for the student of Continental law they are of considerable importance, as they are the basis of the modern corporation law of the Continent.[342] The *commenda* was the most important speculative business of the Middle Ages,[343] and its origin can be traced from the X Century, when we first meet it,[344] back through the Later Roman Empire[345] to the uncodified laws of Justinianean times, those laws which Brunner called the Vulgar Laws.[346] It represents the old maritime loan with the added element of profit on transmarine trade,[347] and by the XIII Century the maritime loan seems usually to have been a *commenda,*[348] and always, as a matter of course, a business of credit.[349] It is even possible that the *commenda* may have been used as a sort of transfer of money to distant places.[350]

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[337] *Ib.,* p. ccxxv.

[338] The loan was repaid free from all general average losses, *ib.,* p. cclii.

[339] *Ib.,* p. ccxxv.

[340] *Ib.,* pp. ccxxv–ccxxxi.

[341] Bensa, p. 23. "L'accomenda e la societá furono (almeno nelle prime epoche dopo il mille, a cui risalgono i puí antichi nostri documenti) le forme adottate di preferenza dai commercianti." In Genoa on the 26th and 27th

> "The terms of the contract, as gathered from documents and statutes, are in substance the following:— 1. The advance may be, and generally is, in cash, but it may also consist of goods estimated in cash[351] [or of a ship or of shares in a ship].[352] 2. The terms on which the advance is to be used are defined.[353] In some cases B has the widest possible latitude of dealing with the property;[354] in others he is closely restricted. 3. When the expedition is over B submits his account to A within a reasonable time. He is required to swear to it on A's demand. 4. B is entitled to an allowance for victuals and other necessary expenditure. . . . 5. The advance is made at A's risk; that is to say, where it or part of it is lost without B's default, i. e. by fire, shipwreck, or pirates, B is not liable to replace what is lost.[355] . . . If . . . lost by B's wilful default, B is personally liable to make the loss good. . . . 6. All gains made by B by virtue of the advance are brought into account. 7. Where there has been no

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August, 1160, one notary made 12 *commendas:* in Marseille, in 1248, one notary on one day made as many as 49. Goldschmidt, pp. 266–267, n. 113.

[342] Goldschmidt, p. 254. The *commenda* survives in Louisiana today: *Louisiana Rev. Civ. Code* (Merrick's 3rd ed., 1925) §§ 2839–2851.

[343] Goldschmidt, pp. 314, 346, 91.

[344] *Ib.*, p. 258. Bensa, p. 23.

[345] Goldschmidt, pp. 255–256. For the Lex Visigothorum, see *ib.*, p. 256, n. 79.

[346] For the roots of the *commenda* in Roman law see Goldschmidt, p. 91.

[347] *Ib.*, p. 256.

[348] *Ib.*, p. 257, n. 80.

[349] *Ib.*, p. 262.

[350] *Ib.*, p. 414, n. 85a.

[351] *Ib.*, p. 262.

[352] *Ib.*, p. 259, n. 86a. Above p. 85.

[353] Goldschmidt, p. 264.

[354] *Ib.*, pp. 264–265. In the earlier period the *tractator* seems to have transacted his business in the name of the *commendator;* later on his own authority.

[355] But B. agrees to return it free from all general average losses, Ashburner, p. cclii.

loss, the division is as follows. First, the whole of A's advance is replaced. Then the profits are divided in varying proportions,[356] but the normal system is that A takes three-fourths and B one-fourth.[357] . . . 8. Where B fails to perform his part of the contract, the documents often contain a penal clause, and, 9, the penal sum bears interest at 20 per cent." [358] 10. Moreover, B may act as *tractator* for a number of different persons and is separately liable to each one.[359] In Genoa, Pisa, Venice, and Marseilles, especially, the commenda also came to be used for land business.[360]

THE MEDIÆVAL SOCIETAS

"Its provisions correspond closely with those of the [commenda].[361] 1. The partnership property may consist of cash, goods, or shares of a ship . . . 2. B as a rule has a wider discretion than in contracts of the first class. The duration of the partnership is generally fixed, but sometimes it lasts during the pleasure of the parties. 3. If there is a complete loss not due to default, neither party has any claim against the other. If there is only a partial loss, what remains is divisible in the proportions in which the capital was advanced. 4. All gains made by B by virtue of the partnership property are brought into account . . . 5. Where there have been no losses, then after the capital of the parties has been replaced, the profits are divided in equal shares." [362]

THE COLONNA

Here there is a community between ship, crew, and cargo.

"The Table of Amalfi is in the main a code for ships which go 'ad usum de Rivera,' (c. 1); perhaps in its original form it referred exclusively to them. The custom of the coast was this. The owners of ship, the merchants and the mariners formed a partnership for the conduct of the maritime adventure, the owners giving the ship, the merchants the cargo, and the mariners their services. The whole body of persons interested formed the *societas* or *communitas*. These words are used interchangeably, and the word *columna* has often the same meaning . . . For the purpose of distributing the gains of the adventure, the following arrangement was made. Each mariner had one share . . . The owners of ship had a number of shares varying with the value of their ship . . . The *patronus* was obliged to take *ad accomandum* from any person and to oblige the ship to any person according to the custom of the coast (c. 7); and the *accomandum* and the ship formed one mass and one body (c. 6). The *accomandum* consisted either of money or of merchandise estimated in money . . . A list was made in which were entered the ship with the number of shares which it carried, the goods of each merchant with their respective values, and the names of the mariners. This list was called the *columna* (It. *colonna*), and the *patronus* was obliged to show it to the mariners and partners when the voyage began and to state at the same time where they were going (cc. 4, 10, 66). The *patronus* was not entitled to insert in the *colonna* merchandise which had not been valued. Where he carried merchandise which had not been valued, it paid freight as in ordinary cases; if it was sold in the outport, the net proceeds of sale might be inserted in the *colonna* (c. 11, obscure). The *patronus* could not insert merchandise or men in the *colonna* nor remove them from it without the consent of a majority of the mariners or partners (c. 18, obscure) . . . In ordinary cases the profits of the partnership were derived from the gains made by trafficking with the cargo taken in *accomandum* . . . The profits of the *colonna* might also be augmented by the freight of merchandise carried on the ordinary terms (see c. 11), and by the fares paid by passengers. After the voyage . . . out and back was over, the *patronus* gave his account in Court in the presence of the mariners or partners, and the net profits were divided according to the shares (c. 23). The decision of the consuls was final (c. 39). A consul could increase the share of a person who performed special services to the partnership (c. 12) or the allowance of a mariner or partner who was sent on shore (c. 13). The *colonna* was written in the acts of the Court (c. 30) . . . The Table deals specifically with various expenses which the *colonna* was liable to meet . . . Wreck is dealt with in several places. Two Italian chapters (cc. 8, 33) provide for the case where the ship is wrecked and can be sold. The proceeds of sale are divided *pro rata* with the rest of the *colonna*. The ship is taken for the purpose of receiving contribution as of its value at the commencement of the partnership . . . Three other Italian chapters deal with wreck or capture. If the ship is wrecked or captured, the cargo saved is divided *pro rata*. The mariners are not bound to contribute, but must restore any advance made them (c. 26). If ship is wrecked and can be repaired, the expenses of repairing it are to be borne by the partnership, including therein the mariners' share of profits (c. 27). If the ship is taken and can be ransomed, the ransom is to be borne by the partnership, but the mariners are not bound to contribute (c. 28) . . . C. 47 deals with jettison. The loss is to be made good from profits. So far as the profits are insufficient, or if there are no profits, the loss is to be distributed between the *colonna* and the ship according to their respective share in profits. (*Colonna* is used here in the restricted sense of cargo.) The mariners are not bound to contribute, but they must restore the expenses of their food and any advance made them. Passengers must also contribute in respect to goods or money which they carry. The *patrone* must make good every loss, whether of capital belonging to the *colonna* or of tackle, which arises by his own neglect (c. 44)." [363]

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[356] Goldschmidt, p. 268, n. 117. One might stipulate for a definite interest as well as a share in the profits.

[357] Goldschmidt, pp. 262–263.

[358] Ashburner, pp. ccxxxvii–ccxxxix.

[359] Goldschmidt, p. 266.

[360] *Ib.*, pp. 266–267.

[361] *Ib.*, pp. 260–261. And see an original agreement, *ib.*, p. 260, n. 88 b.

[362] Ashburner, pp. ccxl–ccxli.

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[363] Ashburner, pp. ccxliv–ccxlviii.

This system was followed in those places under the influence of Amalfi and of Genoa.[364]

BOTTOMRY

Bellot[365] gives the usual definitions of bottomry and of respondentia, but it does not seem likely that at this early period the contract of bottomry as we know it had developed out of the maritime loan. There are three necessary and distinguishing characteristics of the modern bottomry bond. 1. The money is raised in some foreign port where the master has no funds or credit. 2. The money is to be applied to the immediate necessities of the ship. 3. The transaction binds the ship and gives rise to a maritime lien. None of these characteristics are completely met with at this period. One cannot agree with Mathiass's statement,[366] reproduced with approval by Goldschmidt, that the true bottomry contract is to be recognized in the statute of Marseilles of 1255. Nor is Goldschmidt's citation [367] of the Constitutum Usus convincing. One finds plain evidence that the ship or the goods are to be bound [368] for the debt, in all the early documents,[369] but there is nothing to show that the second requirement given above is ever complied with, while the first is frankly contradicted by the fact that the loan (if such) is made, in the home port. Everything seems to show that we are still face to face with the old maritime loan [370] or with primitive forms of insurance. It is needless to say that bottomry would fall under the prohibition of the Church as to maritime loans.[371] What Goldschmidt calls the "bottomry of necessity" [372] is the bottomry that concerns us here, and only its very early beginnings can be seen in the Middle Ages.

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[364] Goldschmidt, pp. 270–271.

[365] Bellot, pp. 45–46. "There were, however, extensive classes of transactions in which the amount of interest was not subject to any restriction whatever . . . the first . . . when the contract bearing interest was made in a foreign country, or the loan was to be repaid in a foreign country . . . secondly, that class of cases in which the right to recover the money lent, was, by the terms of the loan, put in jeopardy . . .

"In bottomry, which is in the nature of the mortgage of a ship the owner takes up money to enable him to carry on his voyage, and pledges the keel or bottom of the ship (*partem pro toto*) as a security for the repayment of the loan.

"If the ship is lost, the lender loses the whole of his money, but if it returns in safety, then he gets back his principal, and also premium or interest agreed upon. And this, whatever the amount of such premium or interest, has always been allowed to be a valid contract in all trading nations for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. [Molloy, *De Jur. Mar.*, Book II, Ch. XI, § xv]. Moreover, in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the loan. But if the loan is not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower personally is bound to answer the contract, who, therefore, in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; as when a man lends a merchant £1,000, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed, and this kind of agreement is sometimes called *fœnus nauticum*, and sometimes *usura maritima*."

[366] Cited Goldschmidt, p. 351. "Mathiasz . . . hat zuerst bemerkt, dasz in dem Statut von *Marseille 1255 lib. III, c. 5 de pignore dato in navibus pro aliqua pecunia* die wahre Bodmerei anerkannt ist, nämlich für den Fall, dasz *actum aut dictum fuerit ab eis quod dictum pignus est in viagio . . . ad fortunam creditoris, tunc, amisso pignore, ut dictum est, debitor ille nullatenus tunc de illo debito teneatur.*"

CONTRIBUTION AND GENERAL AVERAGE

The commonest source of the right to contribution was jettison,[373] with which the earliest known provision of the Rhodian law concerns itself.[374] The Greeks had a very broad theory of contribution; [375] the Romans had a narrower one,[376] in accord with modern ideas, and this was followed by the Basilica.[377]

"In Roman law the doctrine of jettison is dealt with mainly in the Digest XIV, 2 'de lege Rodia de iactu,' and the rule is laid down clearly by the Roman jurists. 'The Rhodian law provides,' says Paulus (Dig. XIV, 2, 1 pr.), 'that, if goods are thrown overboard in order to lighten the ship, what is sacrificed for the common benefit should be made good by the common contribution.'"

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[367] Goldschmidt, p. 351. "Das *const. usus* kennt, auszer dem societätsmäszig modifizirten Seedarlehen auf vereinbarten oder gesetzlichen Gewinntheil, auch das reine auf festen Zins (Ashburner disagrees here, p. ccxxxiv), welches vielleicht schon Bodmerei ist: praestantia ad navis fortunam, ad risicum sive fortunam ipsius ligni, pactum fortuna navis: rub. XXIV."

[368] *Ib.*, pp. 349–350. "Indessen begegnet, sicher seit dem 13. Jahrh. die auch statutarisch gestattete Vertragsklausel, dasz mit dem, wenngleich zufälligen Untergange eines speziell verpfändeten Objekts (Schiff, Ladung) die Schuld schlechthin erlischt, und es mag sich in solcher Vertragsübung allmählich das Seedarlehen zur Bodmerei umgebildet haben. . . ." Also *ib.*, p. 416, n. 86a.

[369] *Ib.*, quoted at p. 352.

[370] Cf. Goldschmidt, pp. 133, 413.

[371] *Ib.*, p. 352.

[372] *Ib.*, p. 352. "Nothbodmerei des Schiffers." Also p. 354. "Mit der Ausbildung der Seeversicherung verliert das Seedarlehen seine allgemeine Bedeutung für den Seehandel und schwindet zu der 'Nothbodmerei des Schiffers,' um endlich auch als solche immer mehr zurückzutreten. Dem Mittelalter gehören nur die Anfänge dieser Rückbildung an."

[373] Ashburner, p. cclii.

[374] Above p. 5.

[375] Above p. 6.

[376] Above pp. 14–16.

[377] Above p. 40.

"But the sacrifice must have the effect of insuring the common safety . . . contribution takes place if the common safety is insured at the moment, though the ship is wrecked later on. Goods brought up from the wreck contribute to goods which were thrown overboard at an earlier date (Dig. XIV, 2, 4, 1; Paul. Sent. II, 7, 3 (2)).

"The Roman jurists evidently hesitated at first to grant contribution in respect of injuries to ship."[378]

"So far as we can see from the scanty remains of Book LIII, title 3, of the Basilica, the Basilica adopts without alteration the principles of contribution laid down in the Digest."[379]

"Everything is liable to contribute which has received a benefit from the sacrifice. Goods are liable to contribute even though they did not load the ship (e. g. gems, pearls) and therefore would not in any circumstances have been thrown overboard. Articles of domestic apparel or ornament are liable to contribute, but not consumable stores. The ship is liable to contribute . . . It is nowhere stated that freight is liable to contribute.

"For the purpose of ascertaining what each contributor has to pay, a valuation is made both of the things sacrificed and of the things saved. The things sacrificed are to be valued as of their value at the time of the loss, without taking into account the profit which, in the case of merchandise, might have been obtained by their sale. The things saved are to be valued at the price which they would fetch on sale (Dig. XIV, 2, 2, 4) . . .

"The persons who ought to make contribution are under no direct liability to the persons entitled to enforce it. The only remedy of the latter is against the captain; it is for him to sue the owners of goods saved. The captain may also, if sued by the owners of goods lost, retain the goods saved until they contribute their share . . ."[380]

These principles in regard to jettison are of great importance and therefore are restated here, as it is almost always a point of difference with the later mediæval codes.

"The surest test of the identity of a mediæval system of maritime law with the Roman law,[381] or with any contemporaneous body of mediæval sea-laws, is, as already observed, to be found in the identity of the rule of contribution in cases of maritime jettison. The Roman law on this subject differed from the compilation known as the Maritime Law of the Rhodians. The Consulate of the Sea differed from both of those systems of law, and the Judgments of the Sea differed from the Consulate of the Sea, whilst the principle approved in the Judgments of the Sea has found acceptance with most of the maritime states of modern Europe." [382]

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[378] Ashburner, pp. cclii–ccliii.

[379] *Ib.*, p. cclv.

[380] *Ib.*, pp. ccliv–cclv.

[381] Goldschmidt, p. 344. "6. In der Havereilehre hat in der Hauptsache das römische Prinzip gesiegt, doch sind die Kontributions grundsätze in einzeln Beziehungen verändert. Namentlich zu Gunsten von Schiff und Fracht, z. B. *Oléron*, art. 8; der Schiffer hat die Wahl, ob er mit Schiff oder Fracht kontribuiren will; *Consol.* c. 50–54, 66, 239–251: das Schiff kontribuirt nur mit dem halben Werth und nicht schlecthin mit der Fracht."

The Roman law was followed with particular closeness, in this respect, in the maritime cities of Italy, before they had begun to form their own codes.[383] This is most strikingly proven by the number of manuscripts one finds, dating from the XI and XII Centuries, and containing only the title De Lege Rhodia de Jactu for the use of navigators and merchants.[384]

"A singular feature of the Customs of the Sea [of Valencia] is the rule of contribution in the case of Maritime Jettison. The Roman Law and the Basilica valued the goods cast overboard at their cost price, and the goods preserved at their market price at the port of discharge. The Assizes de Jerusalem valued both classes of goods at their cost price. The Judgments of the Sea valued both the goods cast overboard and the goods preserved on board the ship at the price, which similar goods would fetch at the port of discharge. The Customs of the Sea (Chap. lii) had a shifting scale, according as half the voyage had been completed or not at the time of the jettison. In the former case the value of the goods cast overboard was to be measured by the market price of similar goods at the port of discharge, in the latter case by their cost price at the port of shipment." [385]

"Under Roman law goods lost and goods saved were valued on different principles. In the middle ages two systems prevailed:

"(a) Both classes of goods were valued at their cost price."

This was the usage of Cyprus, Ancona, and the Kingdom of Jerusalem.

"(b) Both classes of goods were valued at their sale price, i. e., what they actually fetched or would have fetched at their port of discharge."

This was the usage of Pisa, Barcelona, Oléron, Bergen, and Lübeck.

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[382] *Black Bk. of Adm.*, III, p. lxvii.

[383] Valery, Introduction to French Edition of Bensa, p. viii. "Il faut noter, d'ailleurs, que les principes du droit commercial recueillis par les Romains et conservés au Digeste, principalement sous le titre *De Lege Rhodia de jactu*, ont précédé toute la législation commerciale de l'Italie. On doit admettre, dit Sclopis (*Hist. de la législation italienne*, traduct. franç., Paris, 1861, t. Ier, p. 167), que cette partie de la loi romaine était des mieux connues et des plus appliquées au Moyen âge, puisqu'on trouve bon nombre de manuscrits des onzième et doùzième siècles qui ne contiennent que ce titre, détaché du reste du corps des lois, pour l'utilité des navigateurs et des commerçants."

[384] Goldschmidt, p. 344.

[385] *Black Bk. of Adm.*, III, p. lxxviii.

"There is the same variety as regards the valuation of the ship. At Amalfi it was to be valued as of its value when it left port (Table, c. 54); at Pisa and Barcelona as of its value at the port of discharge." [386]

In the case of losses not arising from jettison, the Roman rule of no contribution was followed in the Consulate.[387] But a different rule had been developed elsewhere in the Mediterranean, partially as a result of the increase of piracy, a rule that made every loss a source for contribution,[388] and which led practically to mutual insurance by all the co-adventurers.[389] It may be that the general existence of this rule was responsible for the late development of formal insurance.

"The general principle is that whatever remains of the maritime adventure after the loss, whether ship, cargo, or personal luggage, must contribute to the loss." [390]

"The loss of the ship or its tackle, according to the Roman law, gave no right to contribution. According to these chapters [of the Sea-law] the loss of the ship or its tackle gives a right to contribution from cargo unless the loss has arisen from the default of the captain or the captain and crew. The loss of the cargo, according to Roman law, did not give any right to contribution. According to these chapters the loss of cargo gives a right to contribution from ship and from other cargo unless the loss has arisen from the default of the owner of cargo. The rule applies as between the ship on the one hand and the cargo on the other, and as between different parts of the cargo *inter se*." [391]

Under the mediæval codes loss of, or injury to, tackle, except when it happens in order to save persons, goods, or the ship, does not generally give a right to contribution, though there are a few exceptions.[392]

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[386] Ashburner, pp. cclxxvii–cclxxviii.

[387] *Ib.*, p. ccli. "An *avaria* in mediæval Latin is an expense or loss, and the word was applied specially to losses occurring in the course, or in respect, of navigation . . . prima facie all losses occurring in the course, or in respect, of navigation lie where they originally fell (Consulate of Sea, cc. 152, 187)."

[388] *Supra*, pp. 38, 43, 46, 53 n. 60. In respect to piracy the Roman law was very plain; Ashburner, p. ccliv. "As regards pirates, Paulus lays down (Dig. XIV, 2, 2, 3): 'si navis a piratis redempta sit, Servius Ofilius Labeo omnes debere aiunt: quod vero prædones abstulerint, eum perdere cuius fuerint, nec conferendum ei, qui suas merces redemerit' . . . If a merchant goes ashore and has to pay ransom, he has no case for contribution. If pirates board a ship and let it go on receiving the passengers' cash and jewels, there is a case for contribution."

[389] Goldschmidt, p. 344, n. 45. "In Genua, Pisa, Marseille, dem *Consolat* . . . Wie im pseudo-rhodischen Seerecht . . . sind namentlich im Gebiet des adriatischen Meers die Grenzen zwischen gemeinschaftlicher und besonderer Haverei vielfach verwischt."

[390] Ashburner, p. cclxxiv.

[391] *Ib.*, p. cclix.

[392] *Ib.*, pp. cclxxiii–cclxxiv.

"The [mediæval] statutes fall into two groups. 1. Some of them, e. g. the maritime statutes of Ancona, the Constitutum Usus of Pisa, present a complete theory of the law of general average contribution. 2. Others again, e. g. Ragusa, Venice, Zara, Spalato, only deal with isolated points in the law. They presuppose a custom—*consuetudo* or *usus,*—by which the cases are governed, and the statutes merely intervene when there is a dispute as to the terms of the custom or where it is found necessary to modify it."[393] The mediæval theory of jettison was, in a word, that the consent or acquiescence of the merchant directly concerned, or else of a majority of the merchants on board, or of the crew, was required to prove that jettison was necessary under the prevailing circumstances. "The statutes in determining when contribution may be claimed follow as a rule the strict doctrine of Roman law."[394] In accordance with the Roman rule[395] there is cause for contribution when the ship has been ransomed from pirates.[396]

> "In many legislations a deduction of one-third is made from the valuation of the ship, and this deduction is sometimes expressed to be in respect of the tackle, which is not liable to make contribution . . . Under the custom of Valencia of A. D. 1250 the ship contributes for one-half its value. This is followed in the Barcelona Ordinance of A. D. 1340."[397]
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> "The Mediterranean customs have little to say about freight . . . Under the Constitutum Usus of Pisa (c. 29) freight unpaid is liable to make contribution. Under the Barcelona Ordinance of A. D. 1340, the shipowner is entitled to receive freight of things jettisoned, and is liable to contribute in respect of freight, less the expenses required for gaining it, e. g., seamen's wages . . . (generally) the freight appears to be gross freight."[398]

We have already considered the provisions of the Rolls of Oléron, Chs. 8 and 31.

> "The Consulate of the Sea treats of contribution in several places . . . Some chapters merely reproduce, with modifications, the Roman law.[399] [Chs. 50–54, 64, 66, 87, 185, 186, 212] . . . Another group of chapters are 150, 151, 152, to which may be added 187. These chapters are based

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[393] Ashburner, p. cclxviii.
[394] *Ib.*, p. cclxxi.
[395] Above, p. 13.
[396] Ashburner, p. cclxxii.
[397] *Ib.*, p. cclxxvi.
[398] *Ib.*, p. cclxxvi.
[399] *Ib.*, p. cclxxix.

on a different principle . . . where there is a loss, whether of ship or cargo, prima facie the loss lies where it falls. To this principle there are three exceptions: (a) where the loss is incurred for the common safety and has the effect of insuring it; (b) where the loss is occasioned by the act or default of some person other than the owner of the property lost; (c) where there is an agreement between those who share in the maritime adventure that ship and cargo, or cargo *inter se*, shall form a common mass for the purpose of bearing losses, or that cargo shall bear the losses of ship [sic], without the obligation being reciprocal. It is with the last class of exceptions that these chapters of the Consulate deal."[400]

Chapter 251 deals at length with the contribution of freight in cases of jettison.

In the Pisan charter party of 1263 the shipowners agree not to demand contribution in respect of tackle.[401]

WRECK AND SALVAGE

We have already seen that the percentage paid by merchants or travellers when saved from a wreck, in respect to articles of great value or little bulk, which they carried on their persons, or as part of their baggage, though sanctioned by Roman law, had nothing to do with contribution, but was probably designed to prevent the murder of shipwrecked people in order to steal their valuables.[402]

"Several statutes give rewards to mariners who display zeal in saving goods on the occasion of a wreck. At Venice they get 3 per cent. in value of the goods salved, at Pisa 5 per cent. According to the Rooles d'Oléron, no agreement made between merchants and mariners at the time of a wreck is valid, but the mariners are entitled to a percentage fixed by the Court (Art. 4, a later addition, see Pard. I, p. 326, n. 2)."[403]

"C. 45 of the Sea-law is vague but appears to apply in favour of any person who brings goods safe to land from a ship which is lost at sea. In the Byzantine Empire, when a ship was wrecked on the coast, the inhabitants were apparently entitled to a percentage varying with the locality for bringing goods safe to land. (Treaty of 1192 between the Emperor Isaac Angelus and Pisa.)

"With regard to bringing in boats, there is little in the authorities. If a boat is found waterlogged (*turgida*), the crew having been drowned or having abandoned it, he who brings it into harbour or other place of safety is entitled to a reward fixed by the court. (St. Zara, IV, 45; St. Spalat. VI, 21). Under the statutes of Wisby (in Pard. III, p. 120) he who brings a derelict to land is entitled to one half the proceeds of sale of ship and cargo."[404]

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[400] Ashburner, p. cclxxxi.

[401] Mas Latrie, *Documents*, p. 41, cited in Ashburner, p. cclxxiv.

[402] Above, p. 38.

[403] Ashburner, p. cclxxxix. Cleirac's version, Articles XXIX, XXXVI, XLV.

"Claims in regard to goods found, whether at the bottom of the sea or floating on the water, or on the beach, are dealt with at length by the authorities"[405] who fix percentages varying according to the circumstances. Some of these provisions are St. Zara, IV, 45; Ordin. Trani, c. 19–21; St. Ancona, c. 60; Const. Usus Pisa, c. 30; and Consulate of the Sea, c. 207.[406]

The statutes of Ragusa, Phara, Zara, and Spalato even provide for a division where the find has been made by all those on board.[407] Salvage on recapture of a friendly vessel from an enemy is discussed in Ch. 245 of the Consolato,[408] and it appears that at this time it was recognized as a right already existing and founded upon long usage.

OWNERSHIP OF JETSAM

> "In Roman law, where goods were thrown overboard in a storm to lighten the ship, the better opinion was that they continued to belong to their original owners. The point was, were they thrown over 'derelinquentis animo,' and Paul (Dig. XIV, 2, 2, 8), Julian (Dig. XIV, 2, 8 pr; XLI, 7, 7), Gaius (Dig. XLI, 1, 9, 8), and Javolenus (Dig. XLI, 2, 21, 2) answer in the negative . . .
>
> "It is even clearer that, if a ship is wrecked, goods cast ashore cannot be considered as derelict (Dig. XLI, 1, 58; 2, 21, 1), and that he who takes such goods is a thief (Dig. XLVII, 9, 3 pr.) . . .
>
> "These rules are reproduced in the Basilica."[409]

With the weakening of the Empire in the West and the coming of the Dark Ages, beginning with the VI Century, the old Roman rule disappeared, and a new and cruel right grew up, the feudal right of shipwreck. Not merely was the jetsam seized, but also any wreckage of the ship, and sometimes the survivors were made captive.[410] So rapacious did the feudal lords become that false signals were deliberately made in order to cause so profitable an occurrence as a shipwreck.

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[404] Ashburner, p. ccxc.

[405] Goldschmidt, p. 345. "8. Für Bergung finden sich Anfänge gesetzlicher Regelung."

[406] Ashburner, pp. ccxc–ccxciii. Also Cleirac's Articles XXIX–XXX, XXXII–XXXVI, XLIII, XLV–XLVI, of the Rolls of Oléron.

[407] *Ib.*, p. ccxciii.

[408] *Black Bk. of Adm.*, III, pp. 611–631. And see Westlake, Part II (War), pp. 137–138.

[409] Ashburner, p. cclxxxviii; and see above p. 16.

[410] Goldschmidt, p. 117. "Ueberall herrscht, trotz kaiserlicher wie päpstlicher Verbote und Staatsverträge, mindestens den Fremden gegenüber, Strandrecht. Es greift schon seit dem Ausgang des 5. Jahrhunderts wieder um sich." Cussy,

From the very first, efforts were made to suppress this barbarous custom, and the first enactment against it is almost as old as the custom itself, and is to be found in the Visigothic Code.[411] One finds a further long succession of laws, which would seem to attest a lack of success in accomplishing the desired end. Church, Emperor, Kings, Republics, all declared themselves against one of the basest cupidities of human nature. The Emperor Frederick I pronounced against the custom in a constitution from Osimo of 1175 or 1177: "si quis vero miserabili personæ fortuna naufragiorum aliquid abstulerit pœnæ antiquæ legum subjaceat." [412] The Church, in council, as at Nantes in 1127 and in the Lateran in 1179, threatened offenders with excommunication; [413] James I, in 1243, and Alfonso III, in 1286, for Catalonia; the kings of Sicily, in 1231 and in 1270; the Venetian Republic in 1232, all passed laws against the custom. Henry III of England, in 1236, modified the right throughout all his possessions, which at that time included Oléron, Gascony and Poitou. Treaties also were made between neighboring cities and states, and we shall

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p. 102. "Dans les premiers siècles du *moyen âge* (. . . depuis le partage de l'empire romain . . .) l'usage s'était généralement introduit de confisquer *les débris des navires naufragés et les marchandises que la tempête portait sur le rivage;* et quelquefois même de réduire les personnes en captivité; et, cépendant, les défenses n'avaient point été négligées de la part des gouvernements!"

[411] Cussy, p. 102. "Le droit romain renferme sur le naufrage des dispositions conformes à la justice et à l'humanité;—le code des Visigoths prononce des peines sévères contre quiconque pillerait les naufragés; le concile de Latran, en 1079, frappa d'anathème ceux qui tenterait de spolier les naufragés; —le concile de Nantes, en 1127, condamna le principe de confiscation des biens des naufragés;—toutes ces lois et autorités, et d'autres déclarations solennelles encore, n'étaient pas parvenues à lutter avec avantage contre la cupidité barbare des riverains; cupidité qui entraina plusieurs seigneurs territoriaux sur les côtes de la mer, jusqu'au crime d'ordonner de faux signaux, de faire allumer des faux trompeurs, dans le but d'attirer sur les écueils les bâtiments en danger!

"Les lois de Jacques I^{er}, en 1243, et d'Alphonse III, en 1286, pour la Catalogne:—des rois de Sicile, en 1231 et 1270;—de la république de Venise, en 1232, etc. continuèrent la lutte de l'humanité contre la cupidité." (See below, p. 315.)

[412] Desjardins, p. 41, citing Pertz, *Monumenta Historica Germaniæ,* II, p. 162.

[413] *Black Bk. of Adm.,* II, p. lxxxii, n. 1. Desjardins, p. 41. "Excommunicationnis quoque pœnæ subdantur qui Romanos aut alios Christianos pro negociatione vel aliis causis honestis navigiis vectos, aut capere aut rebus suis spoliare præsumunt."

examine some of them when we come to view the English situation.

Various treaties which incidentally deal with the subject are to be found in Amari; by the earliest, dated January 16, 1150, the Arab king of Valenza agrees with Pisa to preserve and to restore the property of shipwrecked Pisans.[414] In 1215 Pisa made a treaty with the Sultan of Egypt, by which the right was abandoned;[415] in 1225 and again, in 1229, Venice made treaties with the Prince of Aleppo which, among other matters, contained a similar provision.[416] In 1231 the Duke of Brittany made a treaty with Louis IX by which he renounced his right to wreck on condition that all ships trading in his ports of Brittany should carry letters of safety (briefs de sauveté), for which a fee was to be paid to him.[417] Treaties and special conventions, are, indeed, of much importance in this subject, and bear witness to the determined efforts of the mediæval rulers to stamp out the old custom.[418] But, as Desjardins well says, "la cupidité l'emportait sur la crainte même de l'excommunication."[419]

Meanwhile a custom sprang up, which, rapacious as it would appear to us today, was none the less a great improvement, for it restored to the owner one-third of the formerly totally lost property. The feudal overlord received another third, and those who had aided in salving the property received the final third. At the same time any pilot who had deliberately wrecked a vessel at the instigation of a feudal lord, was, with him, punished by death.[420]

Cussy writes that in the Rolls of Oléron there are found provisions which require the authorities of the coast to attempt to salve lost ships, to oppose pillage, to give information to the parents of the shipwrecked, to preserve the lost property for a year, and, finally, if the owners cannot be found, to sell it and devote the proceeds to works of charity.[421] Such provisions are unknown to the original version of the Rolls, and are not to be found in the English version, nor in that of Middlebourg. It is evident, therefore, that Cussy must have used the later and expanded versions of Cleirac [422] or Pardessus,[423] and it is a fair inference that the relaxation of this barbarous custom was not well established in Oléron until after the XIV Century. The principle that reclamation in full was possible, if made within a year and a day, was followed by the later French law of the XVI and XVII Centuries. The earlier rule had persisted in France up to that time, for Louis XI still considered it to be one of the appanages of a feudal lord.[424]

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[414] Amari, p. 239. See also Mas Latrie, *Relations,* pp. 79–81.

[415] Heyd, I, p. 413.

[416] *Ib.,* I, pp. 375, 377.

[417] *Black Bk. of Adm.,* II, p. lxxxii.

[418] Nys, p. 286. "Durant cette periode [the later Middle Ages], des privilèges sont obtenus, des conventions sont conclues dans la plupart des pays. Les premières stipulations ont souvent en vue l'abolition du prétendu droit de naufrage en vertu duquel étaient confisqués les débris des navires naufragés et les marchandises que la tempête jetait sur le rivage. Le droit de séjour est accordé."

[419] Desjardins, p. 41.

[420] Cussy, p. 102. "A cette époque, la coutume barbare du pillage des naufragés subit *une heureuse modification:* l'usage s'établit de restituer *un tiers* aux propriétaires des navires et effets naufragés; le second tiers fut attribué au seigneur territorial riverain; le troisième tiers fut abandonné aux personnes que avaient concouru au sauvetage; tout pilote d'ailleurs qui avait fait échouer un navire dans l'intérêt d'un seigneur; tout seigneur complice de ce crime, étaient punis du dernier supplice." Cleirac's version, Rolls of Oléron, Articles XXV–XXVI.

COLLISION

"There was no special Roman law of collision. It was governed by the ordinary rules. If A's ship ran into B's and sank or injured it, or if A's ship stood in B's way and B's ship ran against it and was sunk or injured, the only question was, was there *culpa* or *dolus* on the part of those who were navigating A's ship." [425]

"There is little about collision in the Mediterranean codes," [426] but, as we have already seen, the Mediterranean codes seem to assume that it is easy to decide who is at fault in a collision,[427] and it is only in Article XV of the Rolls of Oléron that we find the first definite provision for damage resulting from collision. Chapters 155–158[428] of the Consulate deal with collision and give a number of cases, some from Chapter 31 of the Pisan Constitutum Usus. In cases of inevitable accident damages are divided, or where both ships are to blame, and these damages are apportioned by experts.[429] According to Goldschmidt[430] there was a special rule in the West Frankish legal circle, which was very similar to the early English concept of a deodand.

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[421] Cussy. p. 103. "Les Rôles d'Oléron, que l'on fait remonter au douzième siècle, imposèrent aux autorités des côtes l'obligation de veiller au sauvetage des bâtiments échoués ou naufragés, de s'opposer au pillage, de faire donner avis aux parents des naufragés. Si *après une année de recherches* les propriétaires n'étaient pas connus, on procédait à la vente des effets sauvés et le produit était employé en oeuvres pies."

[422] In Cleirac's version, see Articles XXV–XXVI, XXIX–XXXVI, XLIII, XLV–XLVII.

[423] Above, p. 63.

[424] Cussy, p. 103. "Bien que ces meilleurs doctrines, favorables aux naufragés, eûssent fait leur chemin à travers les nations, dont les moeurs devenaient plus douces et plus policés, l'exercice *du droit de naufrage* ne s'étaient pas effacé complètement; loin delà; au 15^e siècle, une loi rendue par Louis XI, roi de France, mît encore l'exercice des droits de naufrage au nombre de ceux qui devaient composer l'apanage de son frère . . .

"L'article 24 (Book III, Tit. IX, Ordonnance de la marine of 1681) prononce la restitution à leurs proprietaires des vaisseaux échoués, ainsi que des marchandises et autres effets provenant des bris et naufrages, trouvés en mer et sur les grèves, lorsque la réclamation en sera faite *dans l'an et jour de la publication,* et contre le payement des frais faits pour les sauver; les ordonnances de 1543 et de 1584 faisaient courir le délai à partir du jour du naufrage."

[425] Ashburner, p. cclxxxv.

[426] *Ib.,* p. cclxxxvi.

LIMITATION OF LIABILITY

Limitation of liability was not to be found in the Roman Law, but the wrongdoer in collision had to make full compensation. The owner of a vessel was personally bound for all the acts of the master falling within the range of his authority as master. He was also responsible for the acts of the master, while engaged in the discharge of his functions as master, as well *ex delicto* as *ex contractu*. If there were several owners each was bound individually for the full amount of the obligations of the master arising from contracts. But for obligations arising from tort, each was bound only for his part, that is, in proportion to the interest he had in the ship.[431]

This rule of unlimited liability of the Roman Law seems to have been followed by the earlier mediæval codes, but in the case of inevitable accident it seems to have been modified by the rule of division of loss. In some later codes there are traces of the rule of division of loss being extended to cases of collision by negligence.[432]

The doctrine of limitation of liability is not to be found in the earlier mediæval codes nor in any codes which are at an earlier state of legal development.

[427] *Supra*, p. 66 and see n. 292, p. 91, above.

[428] *Black Bk. of Adm.*, III, pp. 282–291.

[429] Ashburner, p. cclxxxviii.

[430] Goldschmidt, p. 345. "7. Für die Schiffskollision erhält sich, aber wesentlich nur im westfränkischen Rechtskreis, der germanische Grundsatz, dasz das schädigende Objekt ohne Rücksicht auf Schuld der Betheiligten haftet; auch wird wohl eine Schiff und Ladung unfassende gesetzliche Gefahrsgemeinschaft nach Art der groszen Haverei angenommen."

[431] Dig. 4. 9: 14. 1. 1: 14. 1. 2: 14. 1. 5: 44. 7. 5: 45. 5. 1. Emerigon, *Contracts à la Grosse*, c. 4, § 11.

[432] Swedish Maritime Law, Pardessus, III, 129, 173, 174. Art. 51, Dantzig Sea Laws, *Black Bk. of Adm.*, IV, p. 349.

During the XIV Century a new rule was developing by which ship owners were severally bound for the acts of the master, whether of tort or contract, but the extent of their liability was limited to the value of the ship. The creditors had always their remedy against the vessel, and through that each owner was liable, but not beyond his share in the vessel.[433]

That this was the settled law of the Mediterranean is abundantly shown in the Consulate of the Sea.

In Chapter 194, it is said that if the master borrows money for the necessities of the ship, in a place where the owners do not reside, the whole ship shall pay the loan, and no part owner can object. But if the ship is lost before the loan is paid, no part owner is bound to pay anything.

By Chapter 141, if goods are lost or injured through being laden on deck without the consent of the shipper, and the master has not the means of paying, the ship must pay. But the owners shall not be liable except for the amount of their shares in the ship. The same principle is again stated in Chapter 162, in case of injury to goods by the want of proper apparel or rigging for the vessel.

By the rules of the Consulate, in addition to the direct liability of the master himself, the vessel was tacitly hypothecated for the obligations contracted by him, whether by contract or by tort, but there resulted from this no personal liability of the owners. In Chapter 27 it is said that:

> "In all damages which are here and shall be mentioned in the chapters of the sea, the master supports his part of what the ship pays, and each part owner his part, for the ship pays the whole."

That the legal situation has now changed from primitive times is shown by the fact that one meets with the distinction between torts and contracts.

Torts. The wrongdoer must pay full damages.[434] But if the collision is accidental the ship owner shall not be held liable because it is not his fault.[435]

Contracts. Owners other than the managing owner are not liable to a merchant for the loss of his goods except to the extent of their shares, unless one can impute to them privity to some fault, as, where the ship's equipment is defective.[436] At this early period one can already see a provision that is to be found incorporated in the statutes in force today. Upon contracts with reference to the ship, entered into by his agent, the liability of the shipowner is limited to the value of the ship. Here as regards contracts we already have at the end of the XIV Century all the essential provisions of the modern doctrine respecting limitation of liability.

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[433] Goldschmidt, p. 340, and authorities there cited in n. 25.

[434] Ch. 155, *E si dan li fa, deulo li tot esmenar a restituir.*

[435] Ch. 155, *no li sia tengut de esmenar tot lo dan . . . per co car no es sa culpa.* Also Ch. 158.

Many origins have been suggested for the doctrine of limited liability, but it seems plain that its origin is mediæval and to be found in the Mediterranean Sea. Fremery,[437] traces the origin of this principle to the contract of *commenda*. Such also is the opinion of Marsden, an author whose historical opinions are to be received with the greatest deference.[438]

An analogy is also sought to the Roman action of *noxae deditio,* which seems to personify any inanimate object by means of which the injury is done and to identify it with the actual wrongdoer.[439]

The principle of deodand has also been thought to be founded on the same idea and its chief exponent in this country is Mr. Justice Holmes.[440]

It seems probable that deodand is not the origin of the principle of limited liability, in view of the historically unchallenged opinion that the early mediæval law originated on the Continent of Europe and, in all probability, about the Mediterranean. In this opinion Marsden agrees.[441]

> "No trace of it is to be found in the Digest of the Roman Law, nor in the maritime legislation of the Eastern Empire, nor in the compilation which goes under the name of the 'Rhodian Law', a work which, though

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[436] Chs. 18, 141, 182, 194. *Black Bk. of Adm.,* III, pp. 93, 245, 344, 381.

[437] *Etudes de Droit Commercial,* ch. 27.

[438] Marsden, *Collisions at Sea,* 8th ed., pp. 167, 168. "The contract of *commande,* or joint adventure of shipowners and merchants, corresponding in some respect to the *societe en commandite,* or partnership with limited liability, of modern times, is perhaps the origin of the widespread doctrine of limited liability of shipowners. This kind of association extensively prevailed in the Mediterranean in the Middle Ages, and is frequently mentioned in the *Consolato del Mare.*"

[439] Bynkershoek, *Quaest. Jur. Priv.,* l. 4. c. 20.

[440] *The Common Law,* p. 30. "If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me." Fitz. Abr., Barre, 290.

[441] *Collisions at Sea,* 8th ed., p. 168. Also *The Rebecca,* Fed. Cas. 11,619.

not entitled to the name which it has received, is undoubtedly a work of high antiquity, and of an earlier date than any of the maritime codes of western Europe. It originated in the maritime usages of the Middle Ages, and more particularly in the Mediterranean, where commerce first acquired activity and extension after the fall of the Western Empire. In Italy and the southern ports of France and Spain the custom seems to have been nearly coeval with the revival of maritime commerce. That it had its origin in the Mediterranean, and probably in Italy, the cradle of the modern law merchant, appears from the fact that no traces of it are to be found in the Laws of *Oleron,* a code earlier than the Consulate, at least in the form in which we now have it, and which constitutes the basis of the maritime law of the western parts of Europe; nor is there any indication of it in any of the earlier codes which were derived from this primitive compilation."

Continental law from the beginning of modern times seems consistently to have considered the principle of limited liability as being inherent by its very nature in the law maritime.

The law of Holland has always limited the responsibility of owners, and discharges them from all personal liability, upon their abandoning their interest in the ship to the creditors. Hugo Grotius says that the principle of the Roman Law was never enforced there, and he condemns it as both inequitable and injurious to the interests of trade. As early as 1625 he advocated the limitation of liability upon grounds of public policy in connection with protectionist doctrines. He tells us that the limitation of liability had been applied in his day and long before, in Holland, and he approves of the principle as being agreeable to justice and necessary to encourage shipping.[442]

The support of this doctrine by Grotius upon grounds of public policy is in complete accord with the principles underlying the entire earlier growth of the maritime law.

The doctrine of Grotius applied expressly only to contracts, but Marsden thinks it applied to torts also.[443]

The custom which exempted the owners from personal responsibility for the acts of the master, extended, as has been observed, as well to obligations arising from contracts as from torts. No distinction was made between them, and on the principles upon which the custom stood in its origin and in the time of the Consulate of the Sea, there does not appear to be any just ground for such a distinction.[444]

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[442] *De Jure Belli ac Pacis,* L. 2, ch. 11, Sec. 13. "Apud Hollandos ubi mercatura pridem maxime viguit . . . et nunc et olim constitutum ne exercitoria etiam universi (exercitores) amplius teneantur quam ad æstimationem navis, et eorum quæ in navi sunt. . . Absterrentur enim homines ab exercendis navibus si metuant ne ex facto magistri quasi in infinitum teneantur."

[443] *Collisions at Sea,* 8th ed., p. 168.

RIGHT OF CAPTURE AT SEA

A treaty of 1221 between the cities of Arles and of Pisa permitted

1. the confiscation of enemy merchandise upon a friendly ship;
2. the capture of enemies on a friendly ship;
3. the confiscation of friendly merchandise upon an enemy's ship.[445]

Although it falls a trifle outside our period one may add that this third rule was still in force in France over three centuries later,[446] although it is said that the royal decrees of the XVI Century[447] changed the French rule and that it had previously been that friendly merchandise on an enemy ship went free.[448] This latter was the older and more equitable rule of the Consulate,[449] and it was apparently the rule originally followed in the West and North from the XIV Century onwards and much later adopted by the Declaration of Paris in 1856.[450] Under the Consulate the owners of the friendly cargo were even permitted to purchase the enemy vessel at a reasonable price, in order to avoid delay. In the north of Europe the Consulate's rule seems to have been followed from early times, since in 1438 the Dutch, who were at war with Lübeck and other Hansa towns, decreed that neutral goods found in enemy ships were not good prize, and this, says Grotius, was thenceforward held to be the law.[451] The first rule given at the head of this paragraph seems to have been less controverted at this period.

It was the accepted custom in the western Mediterranean[452] from the XIII Century. Louis XI, writing to the King of Sicily, speaks of the principle as being accepted without question.[453] It was strengthened by the French Ordonnances, spoken of above, which extended the penalty to the confiscation of the friendly ship,[454] and it was finally, with this extension, approved of by Grotius.[455] "The system of the Consolat with respect to enemy and neutral property was the common law of the Mediterranean." [456]

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[444] *The Rebecca,* Fed. Cas. 11,619.

[445] Cited, Desjardins, p. 51. "Et si forte aliquis Arelatensis cum Januensi, donec guerra inter Pisanos et Januenses fuerit, a Pisanis inventus fuerit in eorum navibus eundo vel redeundo, liceat Pisanis et Pisanæ civitatis forciæ et districtus, hominibus Arelatensibus et res eorum tanquam Januensium offendere et capere et capta retinere et non reddere nec reddi facere."

[446] Cussy, p. 197. "Les ordonnances de 1533 et 1543, rendues par François Ier, et de 1584, rendue par Henry IV, savoir: *'que la robe d'ennemi confisque celle d'ami,'* en d'autres termes, que les marchandises, sans égard pour la nationalité des propriétaires, sont confisquées sous pavillon ennemi."

[447] Westlake, Part II (War), p. 141.

[448] Authorities cited in Hall, p. 784, n. 2.

[449] *Black Bk. of Adm.,* III, pp. 539–547.

[450] Hall, p. 787. Westlake, Part II (War), p. 145.

[451] Westlake, Part II (War), p. 141.

[452] Hall, p. 752.

CUSTOMS WAREHOUSES

In the first half of the XIV Century these were already in general use, at least in Italy. The only contemporary account of them of which the present author knows is given in the Decameron, which was written about 1348, and it is here set forth in full.[457]

> Eighth Day, Tenth Novel. "There was, and perhaps still is, a custom in all maritime countries that have ports, that all merchants arriving there with merchandise, should, on discharging, bring all their goods into a warehouse, called in many places 'dogana,' and maintained by the state, or the lord of the land; where those that are assigned to that office allot to each merchant, on receipt of an invoice of all his goods and the value thereof, a room in which he stores his goods under lock and key; whereupon the said officers of the dogana enter all the merchant's goods to his credit in the book of the dogana, and afterwards make him pay duty thereon, or on such part as he withdraws from the warehouse. By which book of the dogana the brokers not seldom find out the sorts and quantities of the merchandise that is there, and also who are the owners thereof, with whom, as occasion serves, they afterwards treat of exchanges, barters, sales and other modes of disposing of the goods. Which custom obtained, as in many other places, so also at Palermo in Sicily."

No physical delivery of the goods was necessary to pass title or to pledge them, but only a written order from the importer.[458] Statutes required the warehouse officials to give and take receipts when goods were brought into or removed from the warehouse.[459] This warehouse receipt appears to the present author to have been more in the nature of a safeguard for the owner or a personal check on the officials and he feels that it lacked independent legal validity. Apparently its mere possession, without a written order from the importer as well, would not be sufficient to change the title shown in the warehouse books, since the title rested with the person in whose name the goods stood,[460] and the written order seems to have been necessary in order to alter the entry. One finds it difficult to agree, therefore, with Goldschmidt's conjecture that the warehouse receipt may have been in the nature of a negotiable instrument.[461]

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[453] Hall, p. 752, n. 1. "Usus in hoc occidentali mari indelebiliter observatus, res hostium et bona, etiamsi infra amicorum aut confœderatorum triremes seu naves positæ sint, nisi obstiterit securitas specialiter super hoc concessa, impune et licite jure bellorum capi posse."

[454] Hall, p. 752.

[455] *Ib.*, p. 752, n. 2.

[456] Westlake, Part II (War), p. 140. Hall, p. 752.

[457] Boccaccio, *The Decameron*, trans. by J. M. Rigg (London, George Routledge & Sons, Ltd.).

[458] Goldschmidt, p. 333. A specimen order form from Straccha is given, n. 118, p. 334. "Mando tibi—ut merces quas apud te habes, tradas pro me Aloysio et eius filio seu illi vel illis, quibus ordinatum fuerit ab eisdem et sequemini eorum ordinem."

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[459] *Ib.*, n. 118, p. 334. For instance, Pisa—"per scripturam reddere et restituere res omnes que mittentur intus dictum fundacum [warehouse] et extraherentur de dicto fundaco."

[460] *Ib.*, p. 334. "Die Waare als Eigenthum der Person galt, auf deren Namen oder mit deren Marke sie eingebracht und im Register verzeichnet war."

[461] *Ib.*, p. 334. "Der Depositalschein . . . mag auch zur Eigenthumsübertragung oder Verpfändung gedient haben." Lastig, also, considers Goldschmidt's suggestion improbable, *ib.*, p. 334, n. 120.

CHAPTER III

European Mediæval Commercial Law

PART I

In the treatment of this topic we propose to make, first, some general observations upon the matters covered in this chapter; next, to discuss the earliest days of the fairs and the conditions there prevalent; third, to trace the growth and the spreading influence of the Italian cities, and the rise in them of the gilds and of the consular system. After a brief glance at the later fairs we shall consider the status of the merchant and his power to legislate and also to modify statutes by custom. We will then examine the matter of the jurisdiction of the commercial courts and of their procedure, and, finally, we shall consider certain doctrines of the substantive law specifically.

For convenience of treatment it has been necessary to separate the commercial from the maritime law in the development of this work. Such a division, it must be said at once, is a purely artificial one, and one that at no time has had any basis in fact. Both concerned the mediæval merchant, just as they concern the modern merchant,[1] quite equally, and when, at a period that falls outside of this chapter, we find Malynes writing a treatise which shall answer to all the requirements of a merchant, he lumps the two groups together, and inventing a much-needed term to describe them collectively, calls them *Lex Mercatoria.* The legal analyst can readily say that salvage is a subject as maritime as partnership is commercial, but there are subjects which fall into both fields, such as reprisals or insurance. The commercial and the maritime laws together formed the law which most intimately concerned mediæval commerce. They both arose under similar conditions, in order to satisfy similar needs, and they have many features in common. We have already spoken of the cosmopolitan and universal nature of the mediæval maritime law.[2] We have shown the existence in that law of certain local exceptions, but we have, we believe, proved that the great body of the law was of a common nature and of a general validity. No less was this the case in the field of the commercial law, and, despite some local variations, we shall see that here also the law was common and unform.[3] For instance, we shall find that the mediæval definition as to what constituted a merchant was adopted in England at the beginning of the XVII Century, and is law in France today.[4] In the matter of the development of the law we shall see that the maritime and the commercial law developed along absolutely similar lines. Like the maritime law, the commercial law stands deeply rooted in the past, and in its development, again, custom had an equally important part, a part so strong that it finally received legal and official sanction.[5] The consuls of the sea and the consuls of the merchants, like the gilds of the sea and the gilds of the merchants, are branches growing from the same trunk,[6] and in the organization and procedure of the respective courts we shall again find striking parallels. Instances [7] could be multiplied, but these given are quite sufficient.

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[1] The modern French Courts of Commerce have jurisdiction over maritime causes as well as over civil causes; *Code de Commerce* (1924), Liv. IV, Tit. II, Art. 633.

[2] Above, p. xvii.

Mediæval commercial law had a dual origin, Germanic and Roman, and it is possible to draw interesting legal comparisons between the former and certain early points of the indigenous English law. The origins of some of the principles of commercial law are to be found in the customs of the Germanic nations, especially as followed in the markets and fairs, and most particularly so in those of northern France, where the Germanic and Roman worlds met and learned the unity of their calling and of their interests,[8] where the law of the markets and fairs contributed progressively to the formation of the municipal law of the cities, to the unification of the private law, and to the softening of international law, and where it introduced modified institutions which had found their origin in the maritime law.[9]

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[3] Mitchell, p. 9.

[4] Below, p. 182.

[5] This principle was, of course, no novelty to the law when it arrived in England.

[6] Lattes, p. 6. "Si potrá inoltre riconoscere che parecchie istituzioni attuali non solo hanno origine in quelle legislazioni, ma le imitano ne' piú minuti particolari."

[7] Huvelin, p. 16.

[8] Goldschmidt, p. 234. Huvelin, p. 258.

[9] Huvelin, pp. 18–19. "Nous verrons comment cet instrument [the law of the markets and fairs] contribua progressivement à la formation du droit municipal des villes, à l'unification du droit privé, à l'adoucissement du droit

But the origin of many principles is to be found in the rules of law which, based on those of Rome, were evolved and developed in the great merchant cities of Italy to meet the changing, growing requirements of international commerce.[10] On the one side, in Germany, in northern France, and in England [11] we behold a development of the law through the medium of the fair, while on the other side, in Italy and in southern France, the law is developed in the mediæval city state. And as the classical and Byzantine traditions lingered longest in these latter parts of the world it will not surprise us to find the Roman and canon laws of considerable influence. In one respect we shall find a noteworthy departure from the Roman rule, and one of the greatest resemblances between Roman and English law. The Romans possessed no separate system of commercial and maritime courts and laws, but considered them to be, and developed them as, part of the general law.[12] In the Middle Ages this body of the law became, as it has remained on the Continent to this day, quite separate from the ordinary body of the law. This was a most important change. "It is clear that both the maritime and the commercial law of the Middle Ages grew up amid similar surroundings, governed the relations of persons engaged in similar pursuits, was enforced in similar tribunals. It is not therefore surprising that, from that time to this, the relations between them have always been of the closest." [13] Finally, like the maritime law, the commercial law strikingly impresses the modern student with its strong international character. "The international nature of the sources from which it drew its rules and of the persons over whom it exercised jurisdiction, combined with the universality of its guiding principles, fairly entitle the Law Merchant to be called 'the private international law' of the Middle Ages." [14]

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des gens, comment enfin il fit entrer dans le mouvement commercial général nombre d'institutions que le droit maritime avait d'abord développées, et comment il les marqua de son empreinte originale en les appropriant aux besoins nouveaux des transactions modernes. C'est ainsi que peu à peu le mécanisme propre au droit maritime s'élargit dans le droit des foires et s'étendit à toutes les branches du commerce."

[10] Holdsworth, *H.E.L.*, V., p. 60.

[11] Although England possessed markets and fairs from an early period, they seem to have played no important part in the general development of the law in that country.

[12] Holdsworth, *H.E.L.*, V., p. 65.

[13] *Ib.* (2nd ed.) I, p. 303.

[14] Mitchell, p. 21. Maitland, *Select Pleas in Manorial Cts.* (S.S.), i, p. 133. "We are indeed dealing with the 'private international law' of the middle ages."

As in so many other fields, it is difficult to know quite where to make a beginning, for nowhere are there clearly defined boundaries to be found. The original Gallic fairs in the north of France were Romanized [15] and were largely attended by the Germanic peoples; [16] in fact, the north of France right over to the Rhine would have to be described as Gallo-Romano-Germanic. To these people, of course, the Empire never "fell," and their commercial relations changed much more slowly than their slowly evolving political relations, so that the markets and fairs became an institution of the Germanic races both within and without the boundaries of the old Empire. When the Goths founded the kingdom of Toulouse in 419, when the kingdom of Burgundy was founded, and especially when the Frankish Empire was established, there seems to have been no interruption in the course of commerce, which continued to follow in the old Roman forms, although the barbarian influence began to show itself in certain dispositions of the law,[17] of which perhaps the most important were the introduction of personal laws which later became class laws, whereby the Burgundian was governed by one law and the Roman by another. Commerce continued to be in the hands of the Roman element, even until a much later period, and this was true in Germany up to Carolingian times.[18] It has sometimes been thought that commerce completely disappeared with the "fall" of the Empire, but nothing could be further from the truth.[19] Huvelin cites many authorities to show this.[20] In the V Century Syrian merchants are met in Marseilles, and Parisian merchants in Syria, Laodicea, and Antioch, while Greek was spoken in the market of Arles. In the VI

Pollock and Maitland, *Hist. of Eng. Law,* I, p. 467. "These rules are . . . a *ius gentium* known to merchants throughout Christendom."

[15] Huvelin, p. 139.

[16] *Ib.,* p. 140.

[17] *Ib.,* p. 142.

[18] Goldschmidt, p. 106.

[19] Huvelin, p. 143. "On est tenté, lorsque l'on parle de cette époque de transition qui, renouvelant le vieux monde romain en lui infusant le jeune sang barbare, créa une civilisation nouvelle sur les débris des civilisations éteintes, de jugea *a priori* que le commerce a dû exister à peine en ces périodes troublées; il n'en est rien; au contraire il semble que le goût des grandes migrations, et l'esprit d'aventures aient contribué à développer le commerce terrestre; que les trafiquants aient trouvé dans les grands déplacements de peuples et d'armées l'occasion de faire de sérieux bénéfices; que les foires enfin aient rencontré, dans l'insécurité juridique et politique de ces temps, un terrain propice pour un essor nouveau."

[20] *Ib.,* p. 144. And see above, pp. 21–22.

Century the posting system was still in working order,[21] while the cities in the South of France traded with Italy, Constantinople, and Asia Minor. Undoubtedly, however, as civilization slowly dwindled away, the business of the merchants became more difficult and more precarious.[22] Violence became frequent and wars were continual, so that justice eventually became impossible. There were two ways for the merchants to emerge from this impossible state of affairs—either to control the general governmental system themselves, or else to ally themselves with the new-born monarchies in order to obtain special rights and privileges. The first method was generally followed in Italy and in the South of France, the latter in the North of France and in Germany: [23] the city-states and the gilds were the child of one; the great fairs the outgrowth of the other, and, at various periods, we find the two systems existing separately and together,[24] yet always working towards the same broad end. The personal nature of the law, of which we have just spoken, seems to the author to have had a tremendous effect on its future development, for we find the first laws of the new barbarian kingdoms creating a special law for certain classes and a special jurisdiction for the merchants, a swift procedure, the right to be judged by special judges,[25] safe conduct on their travels;[26] and this precedent is one that was continuously followed and which became quite universal upon the Continent. As the times became more disturbed, commerce in the North of Europe was compelled to limit itself to the markets, which became the sole seats of commerce, and this change came about with the rise of the feudal system,[27] and for quite analogous reasons. In the North of France the same growth can be observed, but the special jurisdiction did not appear until a little later on. During the Merovingian period the law of the surviving Roman markets and fairs disappeared[28] in the general effort of all the fairs and of all the markets to protect themselves against aggression from every direction. The law seems hardly to have existed for a time, and such peace and law as there was the merchants had to secure for themselves.[29] Where law and order had survived at all, the administration of justice, of taxation, and of the police was no different from that in the rest of the country.[30] There was still one law for all, and all causes still came to the same court. But this tradition of the Roman law was soon to be lost, since the fairs and markets slowly but successfully conquered the right to be independent of the power of the state.[31] In 629 there was founded the great fair of St. Denis by Dagobert I, of which the Church was the beneficiary.[32] This was but the first of a long series of grants, chiefly

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[21] It did not come back into use again until the XIII Century; Huvelin, p. 22.

[22] Holdsworth, *H.E.L.*, V., p. 66.

[23] Morel, pp. 20–21. "Pour sortir de l'anarchie, pour s'assurer le libre exercice de leur profession, pour obtenir le respect de leurs biens et de leurs droits si souvent menacés soit par les seigneurs, auxquels ils étaient désormais soumis, soit par des confrères peu scrupuleux, les marchands des divers pays avaient deux moyens: s'emparer du pouvoir politique, en vue de transformer eux-mêmes l'organisation judiciaire à leur profit, ou bien lier leur sort à celui des royautés naissantes, quitte à en exiger plus tard des privilèges propres à hâter la solution des incessantes difficultés auxquelles le commerce donne lieu."

"Le premier de ces deux moyens fut surtout expérimenté en Italie, où nous allons voir les juridictions commerciales se dégager peu à peu de l'organisation des corporations, maîtresses après de longues luttes des cités septentrionales; le second trouva principalement son application en France et en Allemagne, où les juges des foires vont tenir assises avec la protection du souverain."

[24] Huvelin, pp. 386–387. "Comment sont constitués les tribunaux des marchés et des foires. En effet, deux systèmes sont possibles: ou bien ces tribunaux sont élus par les marchands eux-mêmes (c'est la conception moderne des tribunaux de commerce), ou bien ils émanent, au même titre que les autre juridictions, de la puissance publique. Nous allons voir que ces deux systèmes ont existé, selon les époques, soit à l'exclusion l'un de l'autre, soit parallèlement et qu'ils ont aussi, parfois, engendré un système mixte."

[25] *Ib.*, pp. 144–145. "Aussi les premières lois des nouveaux [barbarian] royaumes méridionaux ont-elles des attentions toutes particulières pour les *transmarini negociatores:* conduit sûr, procédure rapide, droit de n'être jugés que par des juges spéciaux, toutes ces faveurs leur sont accordées. Le Nord de

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la France, plus long à se ressaisir, ne tarde guère à suivre la même voie." *Ib.*, p. 145, n. 1, citing Lex barbara Visigothorum; VII, 2, 18; VIII, 4, 27; I, 1, 7; II, 1, 10; XI, 3, 2. Also Goldschmidt, p. 105, n. 32, giving the text of XI, 3, 2. "Ut transmarini negotiatores suis et telonariis et legibus audiantur. Quum transmarini negotiatores inter se causam habent, nullus de sedibus nostris eos audire præsumat, nisi tantummodo suis legibus audiantur apud telonarios suos." But the *telonarius* was not a true consul in the sense of the Middle Ages, Huvelin, pp. 384–385.

[26] For instance, a letter from Charlemagne to Offa in 796 concerning the mutual protection of merchants "iuxta antiquam consuetudinem negotiandi." Huvelin, p. 152, n. 3.

[27] Huvelin, p. 197. "Le marché, au commencement de la période féodale, constitue le seul siège du commerce. Il n'y a pas de commerce permanent; le commerce périodique seul existe en fait et en droit."

[28] *Ib.*, p. 145.

[29] *Ib.*, p. 145. "La sanction de la paix est aussi une sanction de fait: les marchands se défendent eux-mêmes comme ils peuvent contre l'agression du dehors et du dedans."

[30] *Ib.*, p. 147.

[31] *Ib.*, p. 145. "L'histoire du droit des foires et des marchés pendant la période qui s'étend de la chute de l'empire romaine jusqu'à l'avènement de la dynastie capétienne n'est autre que l'histoire des conquêtes successives qu'a accomplies ce droit aux dépens de la puissance publique."

[32] *Ib.*, p. 146.

to the same beneficiary. The right to hold a fair was much sought after during all this period, for the taxes received by the grantee were a source of profit. It also offered to the Church, in whose hands quite a little manufacture had become concentrated, an outlet for its goods.[83] It was also profitable for the monarchy, since the grantees were not given all of the taxes received. The Merovingians had given no particular protection to the merchants, but with the rise to power of the Carolingians matters greatly improved. The monarchy was stronger and kept a tighter grip on affairs through its officers, who represented it everywhere and who obeyed its orders. Security was once again insured, and the mercantile interests were protected; Church and State worked together to improve not only fiscal conditions but also political, economic, and moral conditions.[84]

The first and perhaps the most important of the Carolingian innovations was to protect the foreign merchant,[85] and under the protection of the strong government commerce sprang up anew and spread from Sweden and Courland to the Orient.[86] The Church, too, extended its temporal influence and formulated the idea of the protection of the poor and of the weak, an idea not entirely foreign to that of the king's protection of travelling merchants.[87] Markets and fairs continued to be granted, and, under the later Carolingians the progress of the market and fair towards an administrative and judicial unit distinct from the land continued. There was a devolution of the jurisdiction over markets and fairs in favor of the local overlords, and also of the Church, which secured, not perhaps without difficulty, the right of collecting the market tolls through its own collectors.[88] But the Church, the principal beneficiary of these grants, was not content solely with these fiscal rights,[39] and sought to extend the scope of its privileges. There was first granted the right to coin money,[40] then, as the decentralization of the Empire proceeded, the Crown sought to find a counterbalance to the growing usurpations of its officers by increasing the power of the Church.[41] Most important, for our purposes, the Church, together with the other grantees of markets and fairs, received the right of jurisdiction over the markets and the fairs,[42] and the Church, together with its fairs and markets, was granted immunity from the power of the royal officials, and, especially, *ab introitu iudicium.*[43] This change had come about by the time of Charles the Fat[44] (876–888) and is a correlative of the

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[83] Goldschmidt, p. 107. Huvelin, p. 159.

[84] Huvelin, pp. 150–151.

[85] *Ib.*, pp. 152–153. "La royauté se fit la protectrice du marchand étranger; elle prit sous son *mundium* tantôt les marchands de tout un pays, tantôt un marchand en particulier ou une communauté de marchands. Les protégés payèrent à leur protecteur une légère redevance moyennant laquelle ils eurent le droit de s'adresser, en cas de besoin, à la juridiction royale. Tous les ans ou tous les deux ans, ils se rendirent à la résidence du roi, pour obtenir, moyennant finance, des lettres de sauvegarde."

[86] *Ib.*, p. 151.

[87] *Ib.*, pp. 155–156. Goldschmidt, p. 113, n. 59.

[88] Huvelin, pp. 160–161. "Alors même que les officiers des abbayes ont été substitués aux officiers royaux pour la perception des tonlieux, on constate que cette substitution ne s'est pas réalisée sans résistances ni conflits: et c'est ce dont témoignent les nombreuses confirmations dont est l'objet, à notre époque, ce précieux privilège. Mais enfin, avec le temps, le principe de la perception

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direct par les bénéficiaires des tonlieux qui leur sont concédés finit par triompher, et par être très généralement admis, implicitement ou explicitement, par la plupart des diplômes carolingiens que nous avons cités."

[39] *Ib.*, p. 158. "L'influence de l'Église se fait encore sentir dans les concessions de marchés et de foires dont elle est le principal bénéficiare. Ces concessions vont se multipliant de plus en plus sous les Carolingiens, surtout depuis le règne de Charles le Chauve. De leur teneur dépend l'étendue des droits concédés. Ces droits sont encore, au commencement de notre période, uniquement des droits fiscaux."

[40] *Ib.*, p. 162.

[41] *Ib.*, p. 165. "Dans ce mouvement de décentralisation qui minait peu à peu l'œuvre de la centralisation carolingienne, la royauté ne trouvait plus d'appui que dans l'Eglise."

[42] *Ib.*, pp. 165–166. "L'Église, alliée du trône, devait recevoir une part de l'autorité et des privilèges de celui-ci. C'est la trait distinctif de l'évolution qui est en train de s'accomplir . . . et qui va se marquer par un pas décisif dans la voie du démembrement de la puissance publique dans les concessions de marchés; il s'agit de l'attribution du droit de juridiction aux concessionaires des marchés et des foires."

[43] *Ib.*, p. 166. "Une évolution parallèle se marquait déjà par le développement de l'immunité, accordée le plus souvent aux monastères ou aux églises . . . Les fonctionnaires royaux ne pouvaient s'y introduire ni pour y rendre la justice, ni pour y lever des impôts . . . ni enfin pour y exercer aucun acte de contrainte ou d'autorité. . . Or de nombreux marches avaient été concédés sous le régime de l'immunité. . . . Ces marchés étaient donc francs *ab introitu iudicium.*"

[44] *Ib.*, pp. 167–169. "L'évolution définitive, en ce qui concerne l'attribution de la justice au seigneur du marché, se réalise sous Charles le Chauve; et cette orientation nouvelle du système des concessions de foires est corrélative des progrès du régime féodal. Le droit de juridiction et de coercition départi dans les nouveaux privilèges à leur bénéficiaires est compris sous le terme de *ban royal* . . . Le ban (bannus, districtus, districtio) [The latter two words mean the right of executing a decision made by authority. In English law *distraint* is the partial equivalent and the derivative], c'est, à l'origine, à la fois l'ordre du roi et la sanction de cet ordre. Plus tard, le même mot sert à désigner la puissance nécessaire à l'exécution d'un droit, puissance qui est le fondement de toute juridiction; il sert enfin à désigner le droit de juridiction lui-même, et certaines de ses applications isolément. La concession du ban forme le trait

progress of the feudal regime. This new right of jurisdiction was strengthened by adding the rights of "ban royal." It is customarily found in the grants of the period, and includes the right to receive the market tolls in person, and the privilege of the special peace by which the market was protected. One may at this period take the great monastery of St. Denis as typical of all. In 849 it was granted judicial immunity—"Hanc totam procinctam deo sanctoque eius Dionysio donamus *cum omni iudicaria potestate: hoc est bannum.*"[45] After this time royal diplomas containing this grant multiply rapidly.[46]

The market is now about to become an administrative and judicial division distinct from the general country, an organism complete and autonomous,[47] though, it must be carefully noted, under the control of the concessionaire, and not independent,[48] like the later Italian cities. We must note still another fact, that commerce had sunk so low in the North of France as to have become quite primitive again, in its character of periodicity.[49] The market was now the only seat of commerce; no longer was there any permanent commerce, but only

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distinctif des diplômes nouveaux . . . Plus tard, elle finit par devenir de style . . . La concession du ban présente un double intérêt. Le premier intérêt est d'ordre fiscal . . . Le deuxième intérêt . . . est d'ordre plus élevé: le ban sert de sanction immédiate à la paix des marchés. La juridiction de droit commun était en effet le plus souvent impuissante . . . pour assurer au marché une paix plus sûre que celle du plat pays, il faut une juridiction extraordinaire, qui s'inspire de principes particulièrement rigoureux, qui puisse infliger des peines particulièrement sévères, et qui soit à même de décider rapidement et sur place des contestations qui peuvent surgir. Tant qu'une juridiction de cet ordre n'existe pas sur les marchés, les marchands durent faire respecter la paix comme ils purent, et au besoin par la force; les cessionaires des foires interposèrent leur autorité pour la maintenir; peut-être même, par une de ces usurpations si fréquent dans cette période, constituèrent-ils déjà des juges pour connaître des litiges de foire; mais la sanction générale, la sanction légale manquait. Elle se trouva dans la concession du ban, qui comprit pour le cessionaire à la fois le droit d'établir une juridiction sur son marché, et d'user, comme moyen de répression, de la sanction propre des injonctions royales, de l'amende élevée du ban royal."

[45] *Ib.*, p. 171.

[46] *Ib.*, p. 172.

[47] *Ib.*, pp. 145–146.

[48] In Germany and in France the fair courts seem to have been created by royal or feudal privilege, and there is little idea of consent. The development of the law, too, was not as unhampered as it was in Italy. In England the king changed it by statute or by charter, and in Germany and in France these town custumals had to be confirmed by each respective town's overlord, so that the feudal and national authorities were not without a hand in its development outside of Italy. Morel, p. 211. Mitchell, p. 37.

[49] Huvelin, p. 8.

the periodic commerce.[50] This was partially the result of circumstances, and partially the result of actual legislation forbidding or controlling [51] permanent commerce, resulting from the faulty economic theories of the times [52] and from the general meagreness of life.[53]

A few words must be said in regard to the organization and the constitution of these earliest Frankish courts, for it is the main contribution that we can be positive that they made to the later law. Under the earliest law the regular judge of the common law was the count, who held the ordinary judicial assizes at stated intervals. But little by little at the side of the assizes there grew up the extraordinary pleas, the *placita,* presided over by the *centenarius* (*vicarius, scultetus, maior, villicus*) who had formerly been only an administrative officer in the markets and who now became an officer of justice. He was assisted by seven *scabini,* appointed by the count, and his jurisdiction was limited, extending chiefly to disputes about personal property and to the less important offences.[54] When the jurisdiction over the markets and fairs had passed into the hands of the grantees these officers were chosen by the grantees, and beside the pleas of the common law there grew up an extraordinary justice over the market which was exercised according to the needs of the moment. From the Carolingian period these assizes of the market were certainly independent of those of the common law.[55] And since they were independent, they were independent of every other form of justice during the time of the market, whether that justice was territorial, personal, or municipal. A merchant who had broken the peace of the market could in no way, and by no excuse, avoid its jurisdiction.[56] The competence of the *centenarius* and of the *scabini* was, as before, principally commercial, and in the more severe criminal

[50] Huvelin, p. 197.

[51] Goldschmidt, p. 141, n. 170, citing a capitulary of Charlemagne of 803.

[52] Huvelin, p. 198 and n. 2; p. 200.

[53] *Ib.,* pp. 203–204.

[54] *Ib.,* pp. 191–192.

[55] *Ib.,* p. 193.

[56] *Ib.,* pp. 194–195. "De ce fait que la justice du marché est une justice particulière, il s'ensuit qu'elle est indépendante de toute autre justice pendant le temps du marché, et, notamment de la justice territoriale et de la justice personnelle, plus tard aussi de la justice municipale. Un marchand qui a rompu la paix du marché est justiciable du tribunal de ce marché, et il ne pourrait pas décliner sa compétence, ni sous le prétexte que la territoire du marché appartient à un seigneur autre que selui qui en à la justice, ni sous le prétexte qu'il est, lui, marchand, l'homme d'un autre seigneur."

offences they had to appeal to the civil authority.[57] From this time on we find our French sources very meager. There is no legislation and one can only infer from the various contemporary documents and grants.[58] Yet the development must have gone on, because in the XII Century we find the fairs of Champagne of real importance for our purposes, and of them we shall later speak. The only special commercial courts of the X and XI Centuries were the courts of the fairs and markets.[59] In the growth of centralized Admiralty courts out of the local courts with their limited jurisdiction we have seen an earlier example of what was about to happen in the commercial courts. We know, also, that special rules for deciding mercantile transactions existed in the XI Century, but they cannot be proved to exist earlier than the middle of the X Century.[60]

Another point that strikes us forcibly at this period, and a point which constitutes the chief difference between the growth of the commercial law of the Italian cities and of the northern fairs, is the narrow and rigorous control of the latter,[61] both by the Church,[62] of which we shall later speak in more detail, and by the State.[63]

We must turn to Germany for a moment in order to amplify our knowledge of the early northern fairs. Even though the legal development of Germany was not as far advanced in this field as in Italy and in France,[64] that country seems to have been the place in which the growth was most rapid during the X and XI Centuries.[65] The general path of development seems to have been the same. There was no considerable amount of commerce in Germany [66] until the Carolingian times, but that dynasty of monarchs set up markets and fairs and protected the merchants,[67] who were chiefly foreigners.[68] Much is to be gleaned from the charters of the fairs and markets of this period. In the first place they usually grant to the local overlord, in plain terms, jurisdiction over the market and freedom from all interference by the royal judges,[69] although, beginning in the XI Century, we see a departure from this usage, in that the merchants are granted the right to judge themselves to a limited extent.[70] As this is different from the earlier French and German rule, we may be seeing here a result of Italian influence. But as yet there were no powerful gilds, and so the development was slow. In their inception these new commercial tribunals were but temporary institutions. Their jurisdiction was limited, and their competence was restricted to business transacted within the market. They sat only from fair to fair, and hence at intervals; they lacked, therefore, a permanent existence, and so they had not yet become a true court of commerce.[71] But the law of the market was the embryonic commercial law of Germany, and in the affairs of the market the merchants took such a part as magistrates in the administration of justice as to qualify them, in the XIII and XIV Centuries, to enter the councils of the cities.[72] In the second place, the charters of the markets and fairs extended the royal protection of merchants so as to include their journeys, both coming

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[57] Huvelin, p. 195.

[58] Pollock and Maitland, *Hist. of Eng. Law,* I, p. 19. "The entervening, the dark age [between the IX and the XIII Centuries], has been called 'the diplomatic age,' whereby is meant that its law must be hazardously inferred from *diplomata,* from charters, from conveyances, from privileges accorded to particular churches or particular towns. No one legislates. The French historian will tell us that the last capitularies which bear the character of general laws are issued by Carloman II, in 884, and that the first legislative *ordonnance* is issued by Louis VII in 1155." But this was not the case in such countries as Italy or England.

[59] Mitchell, p. 39.

[60] *Ib.,* p. 26. Goldschmidt, p. 125, n. 104.

[61] Huvelin, p. 196. Goldschmidt, p. 142.

[62] Huvelin, pp. 156–157. "L'influence de l'Eglise se montrait aussi dans les nombreuses dispositions législatives qui proscrivent les marchés et les foires aux jours des dimanches et des fêtes . . . Mais ici l'Eglise ne put parvenir à triompher . . . Dans notre période, un premier capitulaire prohibe toute tenue de marchés le dimanche, sauf dans les lieux où ces marchés existent de temps immémorial, de droit et de fait. Ils apparaissent, dans deux autres capitulaires postérieurs, comme interdits complètement, sans même que l'on rencontre la réserve précédent. Ces prohibitions n'ont eu aucun effet." In England the Act of 27 Hen. VI, c. 5 (1448) prohibited fairs on Sundays.

[63] Goldschmidt, p. 141, n. 170. In 803, "nullus homo presumat aliter vendere aut emere aut mensurare, nisi sicut dominus Imperator mandatum habet." Huvelin, pp. 207–209.

[64] Morel, p. 210, n. 1. Huvelin, p. 281. Mitchell, p. 69.

[65] Mitchell, p. 23.

[66] Goldschmidt, p. 103. Morel, p. 91.

[67] Morel, p. 92.

[68] Goldschmidt, p. 106. Morel, p. 92.

[69] Mitchell, pp. 23–24. Morel, p. 211.

[70] Morel, pp. 95–96, citing a grant to the merchants of Quedlimburg in 1038— "de omnibus, quæ ad cibaria pertinent, inter se judicent." The privilege of Allensbach, 1075, already speaks of a general custom of merchants— "Ipsi autem mercatores inter se vel alios nulla alia faciant judicia præterquam quæ Constantiensibus Basiliensibus et omnibus mercatoribus ab antiquis temporibus sunt concessa." The earliest privileges seem to relate chiefly to foodstuffs. Also Goldschmidt, pp. 127–128, n. 113.

[71] Morel, pp. 95–96.

[72] *Ib.*, p. 97.

and returning.[73] They have become king's men,[74] and their lives, their goods, their booths, are rigorously protected. After the X Century there was set up the inviolable peace of the market, sanctioned by the ban royal.[75] We have just stated that there was a separate *ius mercatorium* at the end of the X and during the XI Centuries,[76] and one can see that it is being built up upon a basis of custom and usage,[77] such as is later to become very important indeed in the history of the law. Until this period there is no sign of spontaneity or of liberty in the development of the law; all is imposed from above; all is protected, just as in France, and quite differently from Italy.[78] One can best sum up the situation in Germany and in France during the XI Century in the words of Mitchell: [79]

> "From at least the 9th century onward the merchants were a class distinguished from the rest of the community by legal privileges that gave them a protection which others did not share, while market and fair formed a separate judicial unit which no royal judge could enter. From the very nature of the case this separate jurisdiction tended in the absence of strong control from the central authority to adapt itself to the requirements of commerce and industry which in fair and market were the all-important elements. The establishment of isolated jurisdictions did not necessarily imply the employment of new law, but the gradual adoption of rules adapted to their special requirements was not only possible but natural. The circumstances were favourable for the growth in market and fair of a special law for merchants and a special law arose. But it is not till the end of the 10th century when these favourable circumstances were well established that there is conclusive evidence that special rules existed."

We must now turn from the North of Europe in order to consider the development of the commercial law in Italy. We have previously shown the continuity of civilization in Italy and its close relations with the Later Roman Empire, especially through the great commercial cities. Just as in the case of the maritime law, we shall expect to find the continuing influence of Roman law very great, and we shall expect to find the divergences here, as there, the result of a customary growth. Such is the exact case. In the Later Roman Empire the commercial law hardly changed for a millennium, although it tended strongly towards monopoly. The old Justinianean system continued in its essentials, just as the trade routes, especially to the East, remained the same.[80] The later Roman emperors deprived the Italian cities of the right to nominate their chief officials about the VIII Century, and in the X Century Leo the Philosopher suppressed their municipal organization completely. M. Morel finds the origin of their emancipation in the descent in 951 of the German emperor, Otho I, into Italy, to protect Adelaide, the widow of Lothair, against the persecutions of the latter's successor and rival, Berenger II, when Otho, in order to set a limit to the encroachments of the counts, sought the friendship of the cities by permitting them to reorganize their government. The power of the cities grew so rapidly thereafter that in another half century they were able to resist the German Emperor himself.[81]

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[73] Mitchell, p. 25.

[74] Goldschmidt, pp. 112–113. Huvelin, p. 152, n. 3.

[75] Huvelin, pp. 169, 227. Morel, pp. 92–93.

[76] Goldschmidt, p. 125, n. 104.

[77] See all the documents cited in Goldschmidt, pp. 127–128, n. 113, such as *pro mercatorio usu, pro consuetudinario et legitimo jure omnium mercatorum,* etc.

[78] Morel, p. 92. "L'idée de liberté est à la base des juridictions commerciales italiennes, les juridictions commerciales allemandes sont avant tout fondés sur une idée de protection." The Carolingians regulated the currency, measures, weights, customs, etc. Goldschmidt, p. 126.

[79] Mitchell, pp. 25–26.

The power within each city belonged from that time to the corporations of arts and trades. These latter, of which one finds some traces from the first centuries of our era and which had even received a legal sanction from the Emperors Valentinian and Valens, had apparently painfully and obscurely survived to the period of the crisis of the barbarian domination.[82] Their members, who were active and industrious, had been for a long time the victims of their imperial or princely masters, who levied contributions on them when they did not absolutely ruin their enterprises by bloody conflicts.[83]

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[80] Goldschmidt, pp. 96–97. "Im Byzantinischen Reich bestehen die Verkehrsverhältnisse der alten Welt gegen ein Jahrtausend ohne erheblich neue Gestaltungen, nur in wachsender Verknöcherung, dann Verkümmerung unter einem starren Monopolsysteme fort. Sein Rechtswesen ist und bleibt wesentlich das hellenistisch—römische, kodificirt in dem Justinianischen Gesetzbuch, später (als *ius Graeco-Romanum*) in der revidirenden Version der Basiliken (Basilius Macedo und Leo Philosophus 886 bis 911), wenngleich zeitweise bedeutsame Ansätze zu einer selbständigen oder doch, z. B. hinsichtlich des Vertragssystems, den Entwickelungsgang abschlieszenden Gesetzgebung begegnen. Auch die Wege und Ziele des Handelsverkehrs—insbesondere Indien und China—bleiben wesentlich die alten, nur dasz der orientalische Zwischenhandel zu erheblichem Theil in persische, später arabische Hand gelangt." See also *ib.*, p. 143.

[81] Morel, pp. 23–24.

[82] An excellent and full account of these ancestors of the gilds as they existed in the Later Roman Empire is to be found in Goldschmidt, pp. 87–89.

Resigned as long as they were powerless, the merchants strongly asserted their ambitions when the Emperors entered into strife with the counts and the bishops,[84] thus following the first of the two possible methods which we have suggested above—to control the governmental system themselves.[85] Their success was the more easy because for many years there did not exist any organized authority outside the corporations,[86] which had been growing in strength since the X and especially the XI Century. Out of this new confederacy there came the independent city republic, the commune,[87] founded on a new basis of custom and yet retaining some of the older Roman municipal organization. By reason of these circumstances, when the administration of the government and justice fell into the corporations' hands at the same time, those to whom they delegated, at the beginning, the exercise of power, were called *consules communi*,[88] and were in some manner the presidents of free cities, as at Genoa and Pisa, where they directly succeeded the counts.[89] The consuls first appear at Pisa in 1087,[90] and they seem to be high corporation officials invested with many sorts of public duties and powers. This connection of the public official with the private corporation was never wholly lost.[91] So long as the commerce of the Italian cities was not of great importance there was no necessity to divide the sovereign authority, and the consuls could turn from finance to administration, or from diplomacy to holding courts[92] in which all classes of cases were tried together.[93]

But soon, with the development of liberty and the parallel progress of civilization, commerce, favored in the interior of Italy by the improvement of canals and of the roads and bridges and outside by the distant expeditions of Christianity, assumed considerable proportions. The riches of the East were heaped up in the cities of the littoral; in the cities of the interior the manufacture of arms and of woollen goods created capital which the bankers, celebrated under the name of Lombards, rapidly poured out over all western Europe.[94]

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[83] Morel, p. 24.

[84] Goldschmidt, p. 148.

[85] Above p. 129, n. 23.

[86] Morel, p. 24.

[87] Goldschmidt, p. 153.

[88] *Ib.*, pp. 153, 163, n. 68a. Schaube, p. 282.

[89] Morel, pp. 24–25. Silberschmidt, p. 3.

[90] Goldschmidt, p. 154, n. 37. Schaube, p. 282. Heyd, I, pp. 132–133.

[91] Morel, p. 25. Goldschmidt, p. 165, n. 74.

[92] Morel, p. 26.

[93] Mitchell, p. 40.

With the increasing commerce, the number of trials necessarily increased. From that time the *consules de communi,* who, we have seen, did not lack for civic business outside of that which procured for them their title of judges, became absolutely incapable of fulfilling their too heavy task.[95] Different expedients were concurrently experimented with—often the cities were divided up and new magistrates appointed for each quarter. But in multiplying these officials it frequently happened that their powers and duties were restricted, and so we eventually behold the emergence of true judicial officers, who relieved the *consules de communi* in some of the causes. At Verona they were called *consules judices,* at Genoa, *consules de placitis,* at Como, *consules justitiæ,* at Milan, *consules de justitia.*[96] At Genoa the consuls of the commune had originally conducted the whole administration and jurisdiction; but in 1130, within half a century of the origin of the consulate there, a trial was made of transferring a part of the jurisdiction to separate consuls; besides the usual *consules de communi* there were appointed for each of the seven special companies two *consules de placitis,* known also as *consules causarum.*[97]

The judiciary consuls having in their turn become insufficient, there was no hesitation in many cities in dividing their powers among a certain number of judges who had a still more restricted competence. After these successive divisions the situation, about the middle of the XII Century, in most of the Italian cities, was as follows: the ordinary jurisdiction was exercised by the *consules de communi* all together, discharging equally the duties of municipal authorities, and by a series of special magistracies, separated from the primitive consulate, whose incumbents, most often laymen well versed in commercial law, bore the title of consuls. Within this last category figure the precursors of the modern consular judges, the *consules mercatorum,*[98] who were, at the same time, at the head of a gild.[99] They first appear at Piacenza in 1154,[100] at Milan in 1159,[101] at Pisa in 1162, and by the end of the century practically every Italian city had them, presumably borrowing from one another in the usual fashion.[102]

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[94] Morel, p. 26.

[95] Mitchell, p. 41.

[96] Morel, pp. 26–27.

[97] Lastig, *Quellen des Handelsrechts,* p. 91. "Die Consuln versahen die gesammte Administration und Jurisdiction; 1130 machte man den Versuch einen Theil der Jurisdiction besonderen Consuln zu übertragen, nebenden gewöhnlichen consules de comuni wurden für jede der sieben Particular compagne zwei consules de placitis, auch consules causarum u. s. w. genannt, bestellt."

The first *consules mercatorum* of Pisa were elected by the other consuls of the city, as also was the case in Como, Pavia, and Modena,[103] and were frequently chosen from the noble class, as well as from the merchants. This leads Morel to suppose that at this period there was no separate commercial jurisdiction, but that the consuls were charged with general duties, because it was not only their duty as heads of the gilds to protect the merchants against exactions and to work for the development of international relations, but also at the same time to increase the prestige and the influence of the corporation whose honor and dignity rested in their hands. The consuls had also the oversight of the corporation's finances and the administration of its real property, and they enforced the decisions taken by the council of the gild. Finally they had limited judicial functions. By periodic inspections they investigated whether members conformed to the commercial standard of the gild; they settled certain disputes, whether commercial or not, committed to them by the *consules de communi;* and, finally, they decided compulsorily all commercial cases arising among members of the gild.[104] But their number and their terms[105] varied considerably, and usually civilian judges, laymen experienced in commercial customs and practices,[106] were included among their number.

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[98] Morel, p. 27. Mitchell, p. 41.

[99] Goldschmidt, p. 163. Venice was the conspicuous exception, for the gilds had been entirely deprived of power. The consuls of the merchants were only public officials administering justice in civil, mercantile, and maritime matters. They were created in the first half of the XIII Century. Lattes, p. 30.

[100] Goldschmidt, p. 163, n. 68a. Schaube, p. 282.

[101] Morel, pp. 29–30.

[102] Lattes, p. 39, n. 1; *ib.,* p. 6.

[103] Silberschmidt, p. 6.

[104] Lattes, p. 38. "Le principali attribuzioni dei consoli sono molto analoghe a quelle dei Capi di collegi d'arte . . . funzioni giudiziarie: giudicare in prima istanza delle cause commerciali tra mercanti, fossero membri della corporazione od estranei, sentenziare anche nelle altre cause comprese nelle loro giurisdizione, eseguire le proprie sentenze e quelle dei consoli precedenti, per lo piú senz'-arbitrio di far grazia né rimettere la pena." Goldschmidt, pp. 169–170.

[105] Goldschmidt, pp. 164–165, and n. 73.

At this early period the gild consuls were certainly not recognized as officials of the state,[107] and their authority as judges over the members of a gild rested upon a basis that was purely consensual, corporate, and private.[108] Beyond the limits of the gild the judicial power of the consul vanished.[109]

By the single fact that he inscribed his name upon the rolls of one of the gilds a man contracted many and severe obligations, the most important consisting of swearing obedience to the statutes in force within the gild,[110] which were especially addressed to conflicts among the members. These conflicts were brought for decision before the heads of the gilds, the *consules mercatorum*. It was forbidden to carry the disputes to an outside court under penalty of a heavy fine, or even of expulsion, and here we see the first source of the consular jurisdiction.[111] Even if a member were to carry his case outside, the consul was pledged to return the case to the gild court at the demand of the defendant.[112]

The practice of arbitration, especially in Florence, also had a considerable influence on the development of the new jurisdiction, for in that city the *consules de communi* sent many cases back to the corporations for decision. Thus it was at Pisa, where the *consules maris* often acted as arbitrators. Whether or not the original character of the *consules mercatorum* was corporate and contractual, or only arbitral, it is certain that with the more and more profound separation of the *consules mercatorum* and of the *consules de communi* the corporate character tended to prevail.[113]

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[106] Lattes, p. 36. "Il numero [di consoli] era diverso secondo i luoghi, e non di rado si distinguevano i *giudici* dai *laici*, ossia i periti nella scienza giuridica dai profani, esperti solo nella pratica de' traffici e delle consuetudini mercantili."

[107] Goldschmidt, p. 165, n. 74.

[108] *Ib.*, p. 171. Morel, p. 211. "Les tribunaux de commerce italiens, à l'origine, ont un caractère essentiellement corporatif."

[109] Morel, p. 38. "Enfin, et c'est surtout là ce qu'il y a de frappant, dès que la contestation sortait des limites de la guilde, la puissance judiciare du consul s'évanouissait: l'art étant une organisation qui n'avait rien d'officiel, il n'y avait lieu, en sa faveur, à aucune intervention de l'Etat. Privée, contractuelle, corporative, telle nous apparaît primitivement la juridiction de l'art." Mitchell, pp. 41–42. Lastig, p. 258. In Florence, "Eine wirkliche, eine staatliche anerkannte Jurisdiction besitzt die Arte Anfangs nicht, dieselbe trägt ihrem Ursprunge nach vielmehr einen ausschliesslich genossenschaftlichen, einen privaten, vertragsmässigen Character."

[110] Lastig, pp. 258–259. In Florence, "durch Beitritt zur Gilde und Beschwörung der Statuten, oder formell gefasst, durch Eintragung in die Gildmatrikel wird der Einzelne ein gildegenosse, unterwirft er sich den Gildesatzungen und damit auch der durch diese statuirten Jurisdiction der Consuln und der Consilarii." Goldschmidt, p. 164.

[111] Morel, p. 35. Mitchell, p. 42.

[112] Lastig, p. 263. In Florence, "Hat sich . . . ein Gildemitgleid dennoch an die ordentlichen Staatsgerichte gewandt, so ist der Consul verpflichtet, auf Ansuchen des Beklagten [who is a member of the same gild as the plaintiff] ihn zu dem angerufenen Richter zu begleiten, um denselben zu ersuchen, die Sache an das Gildegericht abzugeben."

If a merchant were expelled from a gild it was still possible for him to enter into business relations with members of the other gilds, and so in Florence the expelling gild requested all the other gilds to place the offender under an interdict.[114] From a custom of each gild this act became compulsory by their statutes. The five gilds drew closer and closer together and in the early years of the XIV Century became known as the Mercanzia.[115] Its jurisdiction was wider than that of the separate gilds, for it included disputes between any members of any of the five gilds, but still it had no legal existence, although it acquired it in the following twenty years.[116]

The court of the Mercanzia had jurisdiction of all complaints directed against members, whether made by members or by non-members, the latter having complete liberty to sue in the ordinary courts, where, however, the canon law and procedure made cases complex and long-drawn out. On the contrary, justice was rapid and summary before the Mercanzia: "Quod procedatur sine strepitu et figura judicii," reads the classic formula. Nor was this the only advantage, for the spirit of the regulations, the equity of each separate case, rather than the strict letter of the rule, was considered with scrupulous care.[117] Because of these advantages the Florentine merchants who were not members of the gilds came to use the court of the Mercanzia more and more, although, as yet, there was nothing to compel them to do so. They were still quite free to go before the common law judges, but they did not do so, and the field of commercial jurisdiction was enlarged.[118] The first attempt to apply constraint to non-members was made upon foreigners in the endeavor to bring disputes between them and gild members compulsorily within the jurisdiction of the gilds. In 1299 the Florentine money-changers decreed that all foreigners ought to submit to their gild's jurisdiction in case of disputes; if foreigners did not they were put under the ban of the corporation, which was extended by the ban of the other four gilds also. Each of the other gilds rapidly followed this example, and in the early years of the XIV Century the gild courts claimed full jurisdiction over foreigners as plaintiffs or as defendants, although if a foreign merchant refused to submit he could not be prevented from trading with local merchants not belonging to the Mercanzia.[119] The refusal of the non-member of the gild, whether foreigner or citizen, to submit to the jurisdiction of the Mercanzia was naturally a source of much weakness. To overcome this weakness it was necessary to obtain an official recognition of the gild's judicial competence, and this, strangely enough, is connected with the history of the custom of reprisals.[120] We have dealt with the subject at some length below,[121] so we will only say now that this means of obtaining reparation for injuries of which one had been the victim was too simple and appeared to be too convenient not to spread rapidly and to become an institution. But, little by little, it began to be understood what an injury reciprocal reprisals caused to commerce.[122] The Italian cities of the early Middle Ages were preeminently great mercantile cities, and their power in politics, like their wealth, was dependent on their commerce. Appreciating this at an early stage in their career they adopted such regulations and laws as seemed best adapted to the requirements of their trade,[123] and, as a result, reprisals were eventually abolished by mutual agreement.[124] But if there had thus been suppressed a great abuse, at the same time all practical efficacy had been taken away from reprisals, since thenceforth a plaintiff had no other remedy than the pursuit of the defendant, a matter frequently vain or too slow or too expensive. It was necessary to find some substitute, and this was done by enlarging the jurisdiction of the gild, for the suppression of reprisals had been due particularly to the efforts of the heads of the Mercanzia.[125]

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[113] Morel, pp. 36–37.

[114] Goldschmidt, p. 171. Lastig, 266. In Florence, "Jede der fünf Arti maggiori wies ihre Consuln im Statut ein für alle Mal an, im Falle der Interdiction sich bei den übrigen Arti maggiori zu bemühen, dass auch sie über die betreffende Person Interdiction verhängten."

[115] Goldschmidt, pp. 160–161.

[116] Morel, pp. 39–41.

[117] *Ib.*, pp. 41–42.

[118] *Ib.*, pp. 42–43.

[119] Morel, pp. 43–44.
[120] *Ib.*, pp. 44–45.
[121] Below, pp. 224 ff.
[122] Morel, pp. 45–46.
[123] Mitchell, p. 29.
[124] Goldschmidt, p. 121, n. 91; p. 180.
[125] Morel, p. 47.

It was left to the notary of the Mercanzia to settle all the little international difficulties which previously had caused so much trouble when settled by force, and the method was at once simple and expeditious.[126] The *notarius mercanziæ* proceeded upon a complaint against a debtor, compelling him to pay immediately, or to put up a guarantee if he claimed to be in the right, under pain of expulsion. The debtor's associates, brothers, and dependent sons were summoned, too.[127] These remedies were copied elsewhere, and brought in a better commercial security. The results following the intervention of the Mercanzia were so successful that it was decided to give this organization an official sanction, and on March 21, 1308, a Florentine law recognized it as a State court.[128] Soon afterwards there was conceded to this court an advantage which none of the others enjoyed—the long and inconvenient forms of procedure in use by the judicial authorities elsewhere were abolished, but the judgment retained the same validity as if they had been followed.[129] And now that the judgments of the court could be legally enforced, now that its proceedings were swift and summary, it is easy to see that the death knell of the ordinary courts had been sounded, in the matter of reprisals.[130]

The general jurisdiction of the court immediately began to spread to all cases which, closely or remotely, touched upon reprisals; to merchants not members of the Mercanzia but injured in person or in property by reprisals resulting from the faithlessness of some compatriot to his obligations, and also to foreigners.[131] Finally the foreigner [132] and the merchant not a member could be brought before the court as a defendant—all this in the period about 1320—while commercial claims, not connected with reprisals, were received and satisfied.[133] The extension of the competence of the court had been so great that one is justified in saying that the nature of the institution has changed.[134] Its competence, once private, contractual, restricted, and personal, has become public, compulsory, general, and real.[135] It was once the occupation of the litigants that determined the competence of the court, but now it became the nature of the litigation—a commercial case went to the new courts, a civil one to the ordinary courts [136]—and, every agreement among the merchants being considered to be a commercial agreement, the court once special to merchants became special to commercial affairs and we behold the earliest court of commerce.[137] Later statutes make the matter quite explicit and extend the jurisdiction of the court of the Mercanzia to the gild courts on approximately the same terms. At Florence, for example, "the city statutes of 1415 grant to the consular court of a gild the jurisdiction over pleas by its members against non-members, provided only, firstly, that the plaintiff belongs to none of the other gilds, but is a *civis, comitatinus vel districtualis Florentinus* (therefore a private citizen), and, secondly, that the plea relates to claims arising out of a gild transaction; it was no longer necessary that the transaction should fall within the sphere of the complaining gild; it was sufficient if it simply belonged to the business of any one of the gilds; therefore, in short, it was generally a trade or a commercial transaction." [138]

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[126] Morel, p. 48. "Le *notarius mercanziæ*, ou, comme on l'appela plus tard, l'*officialis mercanziæ* trancha dès lors les petites difficultés internationales qui se liquidaient naguère, les armes à la main."

[127] Lastig, p. 271. "Zunächst begann die Mercantia damit . . . sicheren und schnellen Rechtsschutz zu garantiren. Zu diesem Behuf ward bestimmt, dass wenn ein Forense, Staat, Gemeinde oder Einzelperson das Gesuch einreiche, ihm von einem Genossen der Mercantia Befriedigung seiner Forderung zu verschaffen, folgender Weg eingeschlagen werde: Der Notarius Mercantiae, oder wie er später heisst, Officialis Mercantiae, super represaliis deputatus, soll zuerst den Schuldner selbst, dessen Sotii, Fratres comuniter viventes und dessen Söhne, soweit sie noch in väterlicher Gewalt stehen, auffordern, sofort zu bezahlen, oder, falls er sich im Recht fühlend es auf den Process ankommen lässt, unter Bürgschaft zu versprechen, den Staat wie die einzelnen Personen von Florenz, welche durch sein Zögern Nachtheil erleiden würden, schadlos zu halten.—Gibt der Beklagte keine Folge, so wird von den Consuln jeder Arte der für alle fünf Arti wirksame Verruf über ihn verhängt."

[128] Lastig, p. 272. "Welche glücklichen Resultate jene Bestrebungen der Mercantia begleiteten, erhellt am deutlichsten aus der Theilname des Staates ihnen gegenüber, und aus dem Entschluss desselben, dem Officium Mercantiae die ganze Gewalt eines staatlichen Gerichtshofes, ja noch mehr zu verleihen. Dies that er durch das Gesetz vom 21. März 1307 (1308 nach unserm Styl)." Mitchell, p. 43.

[129] Morel, p. 49.

[130] *Ib.*, p. 49.

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[131] The principle of reciprocity is recognized. In Italy the judges are sometimes ordered to give foreigners no better law than their own citizens would have in the foreigner's state. Mitchell, pp. 2–5. Compare Lord Stowell's remarks in *The Santa Cruz,* 1 C. Rob. 50.

[132] Morel, p. 52, n. 1. By the development of an interesting legal fiction. "'Lorsqu'un forain venait s'établir à Florence,' dit M. Thaller, 'on prenait la précaution d'exiger de lui la promesse formelle de se soumettre à la juridiction des consuls des arts majeurs de la place avec lesquels il trafiguerait désormais.' Avec le temps, cette promesse cessa d'être expresse. On arriva à considérer que le seul fait de s'établir dans la ville, constituait une sorte de reconnaissance tacite de la juridiction commerciale." There were often magistrates specially elected to protect the foreigners. Lattes, p. 92. "Per gli statuti mercantili gli stranieri trovavano presso i magistrati delle corporazioni, e talora presso magistrati specialmente eletti a questo scopo, protezione e difesa contro ogni molestia e frode dei cittadini, aiuto a ricuperare le merci di cui fossero stati derubati e ad ottenerne il risarchimento. Ad essi era permesso in generale l'esercizio del commercio e delle industrie, salvo poche restrizioni, senza che fosse imposto di regola l'obbligo di iscriversi nella corporazione dei mercanti."

[133] Morel, pp. 50–52.

[134] *Ib.,* p. 52.

[135] Lastig, p. 275. "Das Offitium Mercantiae, bisher als Genossenschaftsgericht nur für die Mitgleider der Mercanzia competent, erhielt innerhalb der Sachgrenzen jetzt die Competenz auch über Nichtgenossen, allgemeine persönliche Competenz." Morel, pp. 52–53. "Que s'est-il donc produit? A force d'élargir le champ d'action de l'*officium mercanziæ,* on est arrivé à lui donner, en matière de commerce, une compétence personnelle à peu près universelle et, petit à petit, sans qu'on y prenne garde, le caractère de cette compétence a subi une modification profonde. De personnelle elle est devenue réelle."

[136] Morel, p. 53. "Primitivement la profession des parties, leur inscription sur les registres d'une guilde étaient les seules choses dont on se préoccupait pour savoir si le différend viendrait ou non devant les *consules mercatorum;* la nature de l'affaire n'entrait point en ligne de compte. Avec le temps, la qualité des plaideurs perdit de son importance: les tribunaux ordinaires accaparant les litiges civils et la majeurs partie des litiges commerciaux étant soumis à l'examen de l'*officium mercanziæ,* qui jugeait plus vite et avec un esprit plus

"To this we add, that every person who carried on moderate business transactions within the sphere of any gild was placed under the jurisdiction of the gild concerned without enrolling." [139] Now while we have been following the special development and the final enlargement of the court of the Mercanzia in Florence, its development was characteristic of all the Italian cities, so that it will not be inaccurate to make the foregoing the basis of a generalization,[140] and to say that before the middle of the XV Century the Italian gild courts can well be regarded as courts peculiar to commercial causes.[141] Yet another purpose that was very influential in the founding of these courts was the desire to withdraw as many cases as possible from the

large, on finit en quelque sorte par être dupe du triage automatique qui s'opérait entre les proces." Goldschmidt, p. 172.

[137] Morel, p. 53.

[138] Lastig, p. 334.

[139] Lastig, p. 334. Also Lattes, p. 84. "Cosí a Milano si chiamavano *consules mercatorum, consules stratæ,* quelli che rappresentavano la associazione, *consules iusticiæ negotiatorum* quelli che esercitavano il potere giudiziario fra tutti i commercianti, benché non iscritti nel ruolo; ed in parecchi statuti civili, nelle prescrizioni date a beneficio del commercio senza riguardo alla corporazione, s'usa spesso la voce *negotiator.*" The merchants' statutes of Pavia (1368) and the statutes of the Mercanzia of Florence (1393) "diciarano che la competenza de' giudici commerciali si estende a tutti coloro che esercitano alcuna delle arti ed industrie comprese nella corporazione, sebbene non fossero matricolati in essa." Mitchell, pp. 43–44.

[140] Morel, p. 53.

[141] Lattes, p. 81, notes 6, 7, 8; pp. 251–253, with notes. Mitchell, p. 45. Morel, p. 209.

jurisdiction of the civil law courts.[142] And if "one can say without exaggeration that the modern commercial jurisdictions were created in the Middle Ages," [143] one can go even further and give the major part of that credit to the Italian cities,[144] dividing it in a lesser degree with the French fairs, where the Italian influence is visible at an early date. We shall speak below of the general procedure of these courts, of the scope of mercantile customs and of gild statutes, and of certain specific principles of their law. We must now briefly consider the Italian tribunals of commerce outside Italy.

As the Italian merchants journeyed abroad they carried with them their own laws and institutions, and they preferred to be judged by one of their own countrymen according to their own customs. This is another peculiar characteristic of the Middle Ages, that the foreigner, resident abroad, wished to be judged by his own consuls, either chosen by himself and his fellow expatriates, or selected by the authorities at home, just like the Europeans in Turkey until the recent abolition of the Capitulations.

The list of colonial consuls, chiefly residing in eastern Europe, which is given in the footnote, has been gleaned from the thirteen hundred pages of Heyd's monumental work and will show how extensive the commerce of the Italian and French cities was in the Orient at an early date, and how widespread the institution of the consulate had become there. In rare instances the consuls were known as viscounts or regents (bailes), and such references are included in the tabulation. Where grants of jurisdiction are specifically made, that fact is noticed, also.[145]

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[142] Lattes, p. 242. "Anzi una delle cause principali, che produssero la formazione di quelle corporazioni, fu appunto il bisogno d'avere siffatti magistrati speciali, ed uno tra gli scopi, per cui venne compiuta la riunione de' sodalizii minori nei piú vasti e comprensivi, cui si diede il nome di Universitá de' mercanti, fu quello d'estendere la giurisdizione de' giudici speciali e sottrarre un numero maggiore di cause alle curie civili."

[143] Morel, p. 215.

[144] Holdsworth, *H.E.L.*, V., p. 66.

[145] References are to the volume and page of Heyd's second edition, Leipzig, 1923. Only the earliest references are given: those after 1300 are in general omitted.

1. In Egypt.

a. At Alexandria: Venice from the commencement of the XIII Century, I, 411. Genoa from 1204: in 1290 by treaty it was agreed that the plaintiff must sue in the court of the defendant, I, 414, 417. Pisa from about 1215: in that year the right of shipwreck was abolished by treaty, I, 413. Marseilles from before

1219, I, 420. Montpellier from the XIII Century: in 1267 Jayme I sent two consuls, and the Aragonese at Alexandria were ordered to submit to their administrative and judicial authority, the latter being both civil and criminal, I, 421. Barcelona: by an ordinance of Jayme I in 1274 the consul was to be named by the council and the prud'hommes of the city, I, 423.

b. At Damietta. Pisa, before 1286, I, 414.

2. In Syria. Here we meet not only consuls for a particular city but for large districts, and frequently they bear the title of viscount also, because of the peculiar organization of the Kingdom of Jerusalem. Pisa as early as 1191 had two consuls (later three), charged with the oversight of her colonies in Syria: from 1248, however, there was but one *consul communis Pisanorum Accon et totius Syriæ,* I, 333, 340. From an early date there was an apparently complete jurisdiction over the consul's own nationals. Thus in 1155 Genoa complained to Pope Hadrian IV because the King of Jerusalem, the Count of Tripoli and the Prince of Antioch were attempting to limit the competence of its colonial courts, and that pope threatened those monarchs with excommunication if they persisted in their violation of the Genoese rights, I, 160. From 1192 there is a series of documents naming the Genoese consuls in Syria, who resided at Acre: frequently they are styled consuls and viscounts, I, 332. The more rare title of regent appears to have been borne only by the Venetian officials, and most frequently in Syria, although sometimes it is met with in the titles of Venetians accredited to the Greek Empire: there was apparently but one official of this rank in Syria at a time, and the office dates at least from the close of the XII Century, I, 330–331. As in the case of Genoa, his official residence was at Acre. His jurisdiction, which was no doubt appellate from the consuls in the various cities, must have been broad, for after the capture of Tyre, when a quarter was ceded to the Venetians by treaty, the following broad grant of power was inserted: "super cuiusque gentis burgenses in vico et domibus Venetorum habitantes eandem justitiam et consuetudines, quas rex super suos, Venetici habeant," I, 160, n. 2.

a. At Acre. Pisa: in 1179 the head of the colony is styled consul, I, 159. Amalfi, by a charter of April 10, 1190, I, 314. Ancona by a treaty of August 10, 1257, and among the privileges was that of its own tribunal, I, 318. Genoa, from the time of the capture in 1104, I, 158. Marseilles, from 1236, and probably earlier, I, 334, as their privileges were confirmed in 1284, I, 329. Montpellier, from the middle of the XIII Century, or earlier, I, 328, 334.

b. At Tyre. Genoa, from 1187 or earlier, I, 333, 350. Venice, from the capture in 1124, with the full grant of jurisdiction quoted above, I, 160. Pisa, from 1156, when Baldwin IV granted them their own court, I, 159. Montpellier, with the towns of St. Gilles, Marseilles, and Barcelona formed the *commune Provencale mixte,* administered from 1187 by six or seven consuls, with a common tribunal presided over by a single viscount, I, 334. By the middle of the XIII Century Montpellier had its own consul, I, 328.

c. At Antioch. Genoa from 1190, I, 325. Pisa from 1200, I, 325. Privileges as to the competence of their courts were granted to each.

d. At Laodicea. Venice, from 1230, by a treaty with the Mahommedan prince, who granted their court jurisdiction of all matters between Venetians, promised to protect those shipwrecked and agreed to abstain from reprisals arising out of thefts, I, 376–377.

e. At Beyrout. Venice, *circa* 1250, I, 332. Genoa, before 1279, I, 333. Marseilles, *circa* 1250, I, 334.

f. At Tripoli. Montpellier, in 1243, by a treaty which authorized the consul to decide suits both between colonials of Montpellier and also between them and colonials of Genoa or Pisa, I, 324. Venice, *circa* 1250, I, 332. Pisa, *circa* 1270, I, 333. Montpellier, late XIII Century, I, 334.

g. At Aleppo. Venice, by the same treaty as Laodicea: see above.

3. In Cyprus. Genoa, from 1218 by a charter granting the consuls all jurisdiction, except over capital offenses, I, 362. Later treaties granted even this privilege. The other cities do not appear to have had consuls at Cyprus until the middle of the XIV Century.

4. In Asia Minor.

a. Little Armenia. Genoa, from 1201. The consuls had jurisdiction over their fellow-citizens, I, 370.

b. Simisso. Genoa, before 1317, I, 553.

c. Sinope. Genoa, in 1351 or earlier, I, 552. Venice, apparently about the same period, I, 552.

d. Altoluogo (Ephesus). Venice, from 1348, with the usual jurisdiction, I, 543.

5. Western side of the Black Sea.

a. Licostomo. Genoa, before 1332, I, 533.

b. Bulgaria. Venice, early XIV Century: by a treaty it was agreed to abolish the right of reprisals, and shipwrecked goods were to be protected, I, 530–531. Genoa, late XIV Century, I, 532.

6. At Constantinople. Venice, from the closing years of the XII Century, I, 236, 257. Moreover, by a diploma of Alexis III of 1199, Greek plaintiffs suing Venetians either for financial claims or for insults, blows or wounds, had to sue in the Venetian courts, which, in cases brought before them, followed the Byzantine procedure, I, 257, n. 8. Individuals of other Latin nations wishing to sue Venetians had to sue in the Venetian courts also, I, 464, which apparently had both a civil and criminal code, I, 464, n. 4. Genoa, because of the preponderant position of Venice, apparently not until 1251, I, 292. At Galata the Genoese colony was governed by a specially prepared code of six volumes. The collection known as *Magnum volumen Peyre* is a résumé of the customary law of Genoa, treating of criminal, civil and commercial law, and of criminal procedure: it is composed of official instructions addressed to the consular courts, of statutes and edicts, dating from the XII Century to 1290, which form the first five volumes. A series of ordinances, promulgated Dec. 20, 1300, by the representative of Genoa in the Empire, together with the Genoese organic statutes applicable to all the colonies, passed at Genoa, March 16, 1304, and certain other matters, form the sixth volume, I, 456. Every Genoese, even vassals of the emperor, was subject to the jurisdiction of the court, except as defendant in a criminal case when the complaining witness was a Greek and the Podestá had refused to prosecute, and, also, as plaintiff in a civil case against a Greek: in the latter case the Podestá could appeal directly to the Emperor, either on the ground of partiality or of insufficient understanding by the Greek court of the Italian language, I, 458, 459. Pisa, from 1160, and perhaps earlier, I, 258–259. Ancona, date unknown, I, 474. Barcelona, about 1268, I, 476.

7. In the Empire.

a. Athens. Genoa, from 1240, with a consular tribunal, I, 293, before which all except the major crimes of violence were cognizable: here, as elsewhere, "foreigners" had to sue a Genoese, when he was a defendant, in his own court.

b. Thessalonica. Venice, late XIII Century, I, 435.

c. Durazzo and Arta in the Despotate of Epirus. Venice, about 1210, I, 271.

d. Negrepont. Venice, about 1209, and all trials in which Venetians were concerned had to be decided by their judges, I, 282.

e. Crete. Genoa, from 1210, with the usual consular court, I, 278.

This right of consular jurisdiction was sometimes granted by treaty and sometimes merely assumed as a matter of custom.[146] The Italian was the more ready to leave his disputes to the consul because of the generally prevalent feeling of civic trust and of civic unity. Practically all the citizens of an Italian republic were engaged in trade, and their municipal experience in self-government made them well qualified to undertake self-government within the gild. The community of interest between State and individual, which each recognized, goes far to explain the interrelation between gild and government, and the trust of the merchant in his consul or in his magistrates.[147]

We have already examined the existence of this feeling and its scope in the field of maritime law. The growth of the maritime courts was almost contemporaneous from the start with that of the gild courts,[148] and its extension abroad was perfectly analogous. Not only were there resident sea consuls abroad,[149] but there were even travelling consuls in each convoy,[150] and the passengers and crew of a single ship elected their own governors if it did not carry a ship's notary.[151] We can find almost perfect parallels on land.[152] The mediæval Italians, when abroad, generally lived under one of three different types of magistrates.[153]

The first was the *consul missus*, sent to govern the Italian quarter in a foreign city. His duties were administrative and political as well as judicial: he decided summarily all cases brought before him, and thus he was far from being a commercial judge.[154]

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[146] Mitchell, pp. 50–51. Goldschmidt, p. 181. "Nach einem wichtigen Grundsatz des mittelalterlichen Munizipalrechts soll der in der Fremde verweilende Bürger wo möglich nur vor heimischem Richter Recht nehmen." And authorities cited, *ib.* p. 181, n. 143, also pp. 182–184, and notes.

[147] Mitchell, p. 55.

[148] Above, p. 57.

[149] Above, p. 58.

[150] Above, p. 58. Goldschmidt, p. 182. Heyd, I, p. 421.

[151] Goldschmidt, pp. 181–182.

[152] There are a number of other analogies between the maritime law and the commercial law, as hardly needs to be said—the courts, the consuls, the rapid procedure, the travel in convoys, the general similarity and original unity in commercal paper and loans, insurance, the use of notaries and brokers, etc. Huvelin, p. 16. "L'analogie du commerce maritime et du commerce des foires ressort davantage encore si l'on considère l'organisation propre des droits qui les régissent. Les mêmes institutions, nées des mêmes besoins, s'y retrouvent: c'est la juridiction spéciale de la mer à côté du tribunal des foires; c'est le prêt à la grosse qui, ici comme là, engendre la commandite, le change, et qui contribue à y créer l'un au moins des deux principes fondamentaux de l'assurance; c'est le courtage." Goldschmidt, p. 357, and 55. "Es [the Maritime loan] findet analoge Anwendung auf den Binnenverkehr (Darlehen auf Landgefahr)."

[153] Morel, p. 81.

The *consul electus* was chosen by the merchants themselves in the smaller colonies, without the previous making of a treaty with the local authority. His power was only arbitral—to decide cases submitted to him.[155]

The *consul hospes* was a citizen of the state in which his protegés dwelt. He had various important duties—to protect them, aid them in disposing of their goods, look after their collective rights, defend them individually and to maintain order and justice among them, especially in matters of commerce. He was quite like the ancient Greek *proxenia* in many respects, but, still further, he had judicial power, and it is this that Morel considers to be so important, for he attributes a great deal of the spread and of the copying of customs to the influence of the *consul hospes*.[156] It was his duty to judge according to the law of the country or city whose inhabitants he protected.[157] At the same time, as the *consul hospes* was generally one of the prominent citizens of his own city,[158] he would be able to influence his fellow-citizens as to the best laws to adopt or to select. Morel gives an instance which we think to be typical and conclusive. When one compares the *Constitutum Usus* of Pisa with the statutes of Marseilles one finds so many similar articles and analogous dispositions that it seems evident that those who elaborated the latter were inspired by the former,[159] and that a part of the dispositions of the Pisan commercial law has simply been taken over by Marseilles. Is not this more than a simple coincidence when, alone among the other Italian cities, Pisa possessed and had possessed for many years a *consul hospes* at Marseilles?[160] To return, this right to constitute a little *enclave*, to preserve their own mercantile customs, and to be judged by their own laws was often recognized by the sovereign of the state in which the Italians were resident,[161] and their duty to organize in this fashion was sometimes set forth in their home laws.[162] By the XIV Century the Italians were widely spread. They were to be found in Spain, Portugal, France, England, the Low Countries, Germany, Hungary, Russia, and on every shore of the Mediterranean.[163] The great extent of Italian commerce can be shown most vividly by taking account of the relations of a single Florentine firm, the Accaiuoli, who had, about 1341, factors in Pisa, Genoa, Paris, Bruges, London, Avignon, Naples, Tunis, the Morea, Rodi, Famagusta, and Sicily.[164] In 1348 the banking house of the Alberti, of Florence, had a branch at Constantinople.[165] It will not surprise us, therefore, to find the Italian commercial influence so very widespread.

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[154] Morel, p. 82.

[155] *Ib.*, pp. 82–83.

[156] *Ib.*, pp. 83–85.

[157] *Ib.*, p. 85.

[158] *Ib.*, p. 88.

[159] Wagner, *Seerecht*, p. 39.

[160] Morel, p. 86.

[161] Goldschmidt, p. 183, n. 147. A number of such privileges are cited, among them that of Genoese and Pisans in Sicily, granted in 1161–1162 and confirmed in 1220 by Frederic II: "concedimus et damus eis in feudum in unaquaque

Its earliest conquests seem to have been made in the West, nearest to home, among the French cities in Provence, which, from a very early period, had had close commercial relations with those of Italy.[166] In no part of France does the importation of the Italian judiciary institutions peculiar to merchants appear more plainly than in the region of the Mediterranean.[167] Thus consuls appear at Béziers in 1131, at Montpellier in 1141, at Nîmes in 1145, at Narbonne in 1148,[168] and at Grasse before 1155,[169] following their acquisition of an essential autonomy that dates back to the XI Century and the adoption of a general Italian type of city government.[170] Of all the Provençal cities, Marseilles was easily preëminent, and it divided the commerce of the region with the three lesser great cities, Montpellier, Nîmes, and Narbonne.[171] There is no lack of records to show

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civitate maritima—rugam unam eorumque negotiatoribus convenientem cum ecclesia, balneo, fundico et furno—; damus eis, quod in terris quibus negotiatum iverint homines eorum habeant unum vel duos vel plures ianuenses (pisanos), qui inter eos justitiam faciant et rationem; et quod mercatores eorum ubique libere possint habere suum pondus et suam mensuram, quibus inter se res mercesque suas recognoscant."

[162] Goldschmidt, p. 184, n. 148, citing c. 2 of the Constitutum Usus of Pisa: "Loco iudicum habentur, qui extra nostrum districtum a consulibus vel a publico missatico capitanei eliguntur vel a civibus qui ibi fuerint, cum per consules vel missaticum capitaneus ibi non est," and other authorities.

[163] *Ib.*, pp. 185–189.

[164] *Ib.*, p. 189, n. 154.

[165] Heyd, I, p. 474, n. 2.

[166] Morel, p. 142. Huvelin, p. 398.

[167] Morel, p. 143.

[168] *Ib.*, p. 141, n. 1.

[169] Doublet, p. xcix.

[170] Goldschmidt, p. 214.

[171] Morel, p. 131.

that considerable colonies of Italians were settled in these cities from an early date[172] and that their influence was strong in and after the XII Century.[173] It was so strong in the XIII Century that various concessions were made to them in order to persuade them to emigrate from one place to another,[174] just as an enterprising city will try to attract factories today. There was also, as we have just seen, the close connection and knowledge of the Italian cities' law furnished by the institution of *consules hospites*. Finally, there was the influence of the great commercial movement of the Crusades,[175] leading to the establishment of many Provençals in the Orient and to the erection of consulates over them.[176] Now from the early years of the XII Century the Cour des Bourgeois of the Kingdom of Jerusalem had been handling mercantile disputes swiftly and on a basis of equity.[177] At this same time, and even a little before, the Provençal cities had acquired a real or a virtual independence which made it possible for them to provide special legislation for the merchants.[178] Under this double influence there was created a consular court of commerce in Marseilles, which we know was in existence in August, 1162.[179] Later royal charters tell us that there were two judges, and we read, as was usual at this period, that they were "juger et décider sommairement tous procès et différends entre marchands, sans s'atteindre aux subtilités des lois et ordonnances." The right of appeal existed only in sums of over five hundred livres.[180] The other cities had similar courts, and as early as 1204 Montpellier was suppressing all judicial formalities and granting prompt, equitable trials in a typical fashion of which we shall later speak, a fashion altogether agreeable to the mercantile spirit.[181]

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[172] *Ib.*, p. 131. Goldschmidt, p. 185.

[173] Morel, pp. 86–88, 132, 140–143.

[174] *Ib.*, p. 132. Goldschmidt, pp. 195–196. Huvelin, p. 399. The representatives of the consuls of the merchants of Rome, Genoa, Venice, Piacenza, Lucca, Bologna, Pistoja, Florence, Siena, and Milan, resident at Montpellier, negotiated a treaty at Paris with Philip the Hardy in 1277, by which, among other matters, they were to be tried in commercial matters only at Nîmes, or in certain circumstances at Aigues Mortes, and as a result of these concessions they emigrated in a body to Nîmes.

[175] Goldschmidt, p. 215. Morel, p. 134.

[176] Morel, p. 134.

[177] Goldschmidt, pp. 179, 191. Morel, p. 135.

[178] Morel, p. 133. "Beaucoup de villes possédaient une constitution absolument démocratique, républicaine, et le pouvoir du seigneur suzerain n'y était que nominal. Ainsi aux termes de la charte concédée en 1205 par Pierre II d'Aragon, les consuls de Montpellier 'avaient plein pouvoir de statuer, réformer et corriger, toutes les fois et selon qu'ils croiraient utile à la commune de le faire.'"

[179] Morel, p. 136. Mitchell, p. 66.

[180] Morel, pp. 136–137.

But the establishment of new jurisdictions following the Italian models did not halt in Provence, for the Rhône delta was only a channel through which the Italian commerce flowed to more distant points, such as the northern fairs, to which we must now return. At the fairs of Champagne both Italians and Provençals were to be found in great numbers as early as 1245 and constantly thereafter.[182] These fairs were the center of European commerce at that time [183] and at them the Roman and German worlds met and fused and helped to develop the new laws of commerce.[184]

We left the markets of Germany and especially of France at the XI Century: we must now return to follow their subsequent development. We have seen that in their inception markets and fairs were created by royal grant.[185] For reasons that need not detain us the king had lost these rights, together with many others, as the feudal system slowly grew up,[186] and it eventually came to be thought that one of the rights incident to a barony was to create markets.[187] Now in the course of time many markets had tended to grow into cities and to become identified with them, as we shall see when we cast a glance at Germany, and thus to take on a local, limited, agricultural character, and so to lose all real importance for foreigners.[188] The fair, on the other hand, grows in importance during this period and extends its influence over the whole provinces and even beyond kingdoms. Certain fairs had a universal importance, and the fairs of Champagne were the commercial centers of western Europe.[189] At the height of their importance these fairs were all feudal, but, with the beginning of the XV Century, they became royal and began to decline.[190] There is a certain connection between these facts, as we shall shortly see.

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[181] *Ib.*, p. 139. By Art. 8, "Les légistes ne défendent que leurs propres causes. S'ils en ont quelqu'une, un légiste pourra leur être opposé. Il n'y a d'avocats que du consentement des parties." Art. 71: "On ne donnera ni libelle conventionnel, ni délai de vingt jours. Les défendeurs devront répondre le lendemain du dépôt de la demande, ou après l'information du juge." Art. 79: "Qu'on n'observe pas les délais marqués; que la prudence et la sagesse du juge les abregent librement." Art. 81: "L'absence de l'avocat n'est pas une raison pour retarder les débats d'une cause."

[182] *Ib.*, pp. 150–151. Goldschmidt, pp. 194–199.

[183] Goldschmidt, p. 195.

[184] *Ib.*, p. 234. Huvelin, p. 258.

[185] Huvelin, pp. 178–182.

[186] *Ib.*, pp. 182, 184.

[187] *Ib.*, p. 183.

[188] *Ib.*, pp. 240–241.

[189] *Ib.*, p. 241. Goldschmidt, pp. 195, 224.

The IX and X Centuries had been centuries of anarchy both in politics and in commerce.[191] The Normans had devastated the North, the Saracens the Mediterranean, the Hungarians the East.[192] There had been famine and misery so severe all over western Europe that it had been necessary to prohibit the export of most commodities,[193] for the fields lay sterile and uncultivated, and, because of the scarcity of metal money, trade had to be by barter.[194] But when the invasions had ceased and when the definite establishment of feudalism had assured the people of a relative peace, which the Church helped to make more stable, there was everywhere a rebirth of economic and of social life. From the XI Century a new economic activity stirred western Europe and commerce began to flourish again.[195] This new movement was aided by the Crusades, as we have seen,[196] for they reopened the trade routes to the East and created new outlets for the cosmopolitan commerce. And there was a still further geographical consideration.[197] We have previously mentioned the very strategic position of the Italian cities for mediæval commerce.[198] This was no less true of Champagne, whose prosperity, like that of the Italian cities, was singularly aided by its independence.[199] The province constituted a neutral market between Italy, Germany, the Low Countries, England, and France, and its cities, in which the fairs were held, lay on the line of the great commercial road from South to North, from Italy through Provence to the Low Countries and to England, the route to which ran through Montpellier, Nîmes, Beaucaire, Lyon, Châlon, Besançon, Langres, Troyes, Paris, Beauvais, Arras, Calais, and Thourout, near Bruges.[200] The fairs of Champagne, therefore, had a universal importance,[201] from the XII to the XIV Century, for their situation was geographically excellent, half-way along this main route between the Mediterranean and the North. Indeed, most of the routes of that part of Europe converged toward Champagne. Its eastern and northern frontiers marched with those of the Empire and by means of the Seine and the Marne it had easy communication with the Channel. To these advantages of natural situation was added that of being governed, in turbulent times, by a line of able and powerful Counts who were able to maintain peace and who were inspired by wise and moderate principles in economic matters.[202]

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[190] Huvelin, p. 242.

[191] *Ib.*, p. 242.

[192] Goldschmidt, p. 106.

[193] Huvelin, p. 203.

[194] *Ib.*, pp. 259, 538.

[195] *Ib.*, p. 242.

[196] Above, p. 154.

[197] The importance of geography on history is seldom emphasized. A most stimulating book is *The Great Capitals, an Historical Geography* (London, Vaughan Cornish, 1923).

[198] Above, p. 42.

[199] Huvelin, p. 257.

[200] *Ib.*, p. 243.

The origin of the fairs of Champagne is very obscure. They certainly seem to have been in existence in the X Century, but they did not acquire their exceptional commercial importance until the XII Century.[203] There were a great many fairs held in the province of Champagne, but six among them were better known, enjoyed more extended privileges, and had a greater significance from the commercial point of view, than all the others. Such were the two fairs of Provins, the two of Troyes, the one at Bar-sur-Aube, and the one at Lagny-sur-Marne, and it is of these that one speaks under the name of the fairs of Champagne and Brie.[204] Each fair was held at a different time of the year, so that there was never a conflict, but commerce flowed smoothly from place to place. Hence one could always find a fair in progress at one or another of the four places, and so the fairs, though they changed from place to place, were really a perpetual continuation of one and the same fair throughout the entire year.[205] Here in the North, then, commerce had ceased to be periodic and had become continuous again: Champagne had become a fixed fair place and also a place for the periodic payment of debts,[206] like the later fairs of Lyons. The rise of the fairs of Champagne to increased importance was faciliated by the growing safety of travel. In part the merchants had helped themselves by travelling in armed groups,[207] convoys on land quite similar to convoys at sea; [208] partly, too, the kings and the great feudal princes began to protect the merchants and to encourage commerce.[209] "The merchants were the natural allies of efficient government; and conversely such a government was naturally inclined to show favour to men who increased the wealth of the country, and from whom a large revenue could be drawn." [210] In France the protection of the merchant was closely connected with the expansion of the monarchy. Under the reign of St. Louis, of Philippe le Bel, and of the first of the Valois, the royal authorities defended the merchants and their goods against feudal exactions and against the armed bands of robbers that beset the roads.[211] Offences committed against foreigners and, particularly, against merchants travelling to the fairs were frequently punished by very heavy penalties at the common law, like those committed in the fairs themselves.[212] These efforts were supported by the Church, and in 1170 Pope Alexander III launched an anathema against those who committed violence against merchants travelling on the highways.[213] The protection of the king or of the feudal overlord was of two sorts, by armed guards, originally, and, later, by letters of safety. Sometimes the conduct was freely given, sometimes it was a matter of bargain or of treaty, and sometimes it was compulsory. At times it even approached the nature of a contract of insurance.[214] One finds a premium in the dues paid by the merchants, which were in proportion to the quantity of merchandise that they transported; one finds the obligation of the assurer in case of damage to the goods of the assured: in case of any damages suffered by the merchants the overlord is to idemnify them within forty days; and, since it would often be difficult to prove the value of the lost property, it is sufficient to attest it upon oath. Another analogy is found in the fact that certain risks are excluded.[215] In 1301 we find mutual insurance by the Florentine merchants,[216] and in 1318 we find insurance as a regular expense of business.[217] The safety of travel increased as, on the one hand, the overlord became more and more compelled to furnish the safe-conduct,[218] whose acceptance, on the other hand, became obligatory on the merchant.[219] At last there was established the peace of the commercial routes,[220] which was habitually guaranteed in the mediæval concessions of fairs,[221] and was guarded by overlords or by the king.[222] Finally the Guards of the fairs of Champagne took it on themselves to help safeguard the routes and to demand satisfaction for injuries done to merchants travelling to their fairs.[223] With this new safety the fairs would soon be better attended, although, indeed, the wanderings of the merchants had begun in the XI Century,[224] and now their presence, in greater numbers, gave these fairs a true cosmopolitan character [225] and purpose.[226]

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[201] Huvelin, p. 20. Goldschmidt, p. 224.

[202] Huvelin, p. 244.

[203] *Ib.*, p. 245.

[204] *Ib.*, pp. 246–247. Goldschmidt, p. 227.

[205] Goldschmidt, pp. 194–195. "Nun haben, im Unterschiede von allen anderen bekannten Messen, die Champagnermessen, . . . die Eigenthümlichkeit, dasz sie zwar örtlich wechselnde (Troyes, Provins, Lagny, Bar sur Aube), aber in ihrer Gesammtheit (6) das ganze Jahr umfassende Zusammenkunfte sind, d. h. an einem oder dem anderen der 4 Meszorte findet stets eine Messe statt."

[206] *Ib.*, p. 227. "So war . . . die Champagne ein gleichsam ständiger Mesz- und damit Zahlungs- Platz." Also *ib.*, pp. 225, 411.

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[207] Huvelin, pp. 361–362. Goldschmidt, p. 117.

[208] Ashburner, pp. cxlviii-cxlix. Goldschmidt, pp. 359–362, p. 116.

[209] Goldschmidt, pp. 112–113.

[210] Holdsworth, *H.E.L.*, V, p. 63.

[211] Morel, p. 188.

[212] Huvelin, pp. 467–470.

[213] *Ib.*, pp. 357–358. Goldschmidt, p. 233.

[214] Huvelin, pp. 365–366. See the treaty of 1294, there cited, between the "merchants of Italy frequenting the fairs of France" and the Count of Salins and his brother.

[215] *Ib.*, pp. 367–369, and notes.

Numerous documents attest that the Italians attended the fairs of Champagne in crowds,[227] and that they exercised an overwhelming influence there,[228] an influence so great that it has been said that the true Italian fairs are those of France and especially those of Champagne.[229] From the XI Century the Italian commerce had expanded, and most of the European commerce as well by land as by sea, especially in regard to money, credit, and insurance, was in the hands of the enterprising and active merchants who usually went by the generic name of Lombards.[230] They were organized in powerful societies, bearing generally the name of their founder,[231], and all the Italian merchants were united in one larger single society,[232] generally known as the *Universitas mercatorum Lombardorum et Tuscanorum*.[233] At its head was a captain,[234] and, beneath him, consuls from the various cities administered their native law to their fellow-citizens.[235] The Provençals were united in an exactly similar society, no doubt as the result of Italian influence.[236] This right of jurisdiction may have been in existence in 1245,[237] and after this date we find many records of it.[238] The captains possessed the right of disciplinary justice over all the members of their corporations, but they do not seem to have used it except in cases where the parties were from different cities and the ordinary *consules mercatorum* were without jurisdiction.[239] The jurisdiction of the captain, like that in the Italian cities, was characterized by the simplicity of the arguments and the rapidity with which the judgment was put into execution.[240] We have seen that this rapidity and simplicity were the great features of the Italian law, and it seems reasonable to believe that it had a great influence upon those who guided the destinies of the fairs. We must note that the period when the Guards of the fairs were established coincided approximately with the commencement of the Italian monopoly of international traffic.[241]

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[216] Goldschmidt, p. 359, n. 78.

[217] Bensa, p. 50. See below, pp. 240–241 *et seqq.*

[218] Huvelin, pp. 371–372. In the XIV Century the Duke of Wurttemberg was compelled by the tribunal of the Empire to indemnify some merchants going to fairs, because, *contrary to the custom of the Empire,* he had refused them his safe conduct.

[219] *Ib.*, pp. 370–371.

[220] *Ib.*, pp. 372, 377.

[221] *Ib.*, pp. 375–376.

[222] *Ib.*, pp. 377–379.

[223] *Ib.*, pp. 381–382.

[224] Goldschmidt, p. 131. Huvelin, p. 251.

[225] Morel, p. 149. Huvelin, p. 242. Goldschmidt, p. 130.

[226] Morel, p. 149. Witness the ordinance of Philippe de Valois, August 6, 1349. "Les foires de Champagne furent fondées et créées pour le bien et profit commun de tous pays, tant de nostre royaume comme dehors et furent assises et establies ès marches communes pour tous les pays remplir et garnir de denrées et marchandises nécessaires. Et pour ce s'accordèrent et consentirent à la fondation, création et aux ordonnances et coustumes d'icelles foires, prélats, barons, Chrestiens et mescreans, en eux soumettant à la jurisdiction d'icelles."

[227] Morel, p. 150.

[228] *Ib.*, p. 160, n. 1. Goldschmidt, p. 200.

[229] Huvelin, p. 280.

Quite apart from all questions of administration or of regulation there would have existed a serious judicial lacuna in the fairs of Champagne which it would have been necessary for the Guards to fill. At the fairs of Champagne, besides the Italians and Provençals one met with Jews, Englishmen, Scotchmen, Flemings, Walloons,

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[230] *Ib.*, p. 251.

[231] *Ib.*, p. 251.

[232] Goldschmidt, pp. 193, 196. Morel, p. 151.

[233] Goldschmidt, pp. 196–197.

[234] Morel, p. 151. Huvelin, p. 399. Goldschmidt, p. 196.

[235] Morel, p. 151. Huvelin, p. 400.

[236] Huvelin, p. 398. Goldschmidt, pp. 194, 198. Sometimes the Provençals acted with, or were associated with, the Italians.

[237] Goldschmidt, p. 195.

[238] *Ib.*, pp. 195–199. Huvelin, p. 399. It was in existence, as these citations show, *before* 1278.

[239] Huvelin, pp. 399–401.

[240] Morel, p. 151.

[241] *Ib.*, p. 151.

Dutch, Germans, Savoyards, Spaniards, and even Orientals.[242] When any disputes arose among these peoples, most of whom were not organized into *universitates,* or between them and those who were organized, there was need of a special jurisdiction, and for the settlement of these difficulties the Guards of the fairs became the sole competent judges.[243] But we must note that the Italian idea of a jurisdiction emanating from the merchants themselves existed before the establishment of the Guards and continued contemporaneously with them.[244] The first mention of the *custodes nundinarum* of the fairs of Champagne and Brie is to be found in a charter of 1174,[245] and later references are very numerous. They were first chosen by the Count, and, after the union of Champagne to France, by the king.[246] At first they were confirmed in office year after year, but they later held office for longer periods, though they could always be removed for misconduct.[247] They were generally two in number,[248] of whom one was often a knight and one a townsman or merchant.[249] Their duties were both administrative and judicial, and, accidentally and indirectly, they were legislators.[250] They could establish rules in the form of bans; they appointed various fair officials, among them the notaries and the money changers; they inspected the stores, booths, and lodgings for the merchants; they maintained the peace of the fair and looked after its guards and watchmen; they saw to the safety of the merchants,[251] helped to assure the safety of their journeys, and demanded and obtained satisfaction for any injuries done them while travelling.[252] As judges they had cognizance of all crimes and offences committed within the fair, as well as of offences committed outside the fair against those coming from or going to it. As guardians of the seal of the fair [253] they had jurisdiction over all contracts sealed with it, that is, of all contracts made within the fair.[254] But since in general the merchants had peaceable manners there would have been little violence, and the principal subject of the deliberations of the guards would have been necessarily with matters of commerce.[255] This authority they exercised directly at first, but later it was delegated to a chancellor and to lieutenants.[256] Always, however, the original principle was maintained: the jurisdiction over these fairs was derived from the overlord or from the king, and not from the merchants.[257] In this respect the fairs were different from all the other commercial jurisdictions which we have studied. But, as we have seen,[258] the idea of a jurisdiction deriving from the merchants themselves was always present, and it was this latter idea that spread through France and eventually conquered, so that it is the law there today.[259]

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[242] Huvelin, pp. 251–252. For other organizations see Goldschmidt, p. 193, n. 169. Also *ib.,* pp. 224–225.

[243] Huvelin, p. 401. Goldschmidt, p. 234.

[244] Huvelin, pp. 396, 402.

[245] Morel, p. 152. Huvelin, p. 390.

[246] Huvelin, p. 391. Morel, p. 153.

[247] Morel, pp. 152–153. Huvelin, p. 391.

[248] Huvelin, p. 391. Morel, p. 152. Goldschmidt, p. 233.

[249] Huvelin, p. 391.

[250] Morel, p. 154. Huvelin, p. 392.

[251] Huvelin, p. 392.

[252] *Ib.,* pp. 381–382.

[253] *Ib.,* p. 393. "Les gardes des foires sont, pendant longtemps, chargés du sceau des foires, et, puisque le sceau est à cette époque attributif de juridiction, ils ont la juridiction sur tous les contrats revêtus de ce scel; en outre, ils ont,

Thus there had been erected a new court,[260] the first special court of commerce distinct from a gild court.[261] In civil matters its jurisdiction was limited to disputes arising out of transactions made within the fair.[262] Its procedure was to be at once summary, simple, and equitable,[263] the first a rule that had entered the law of the market

comme officiers de police, la connaissance des crimes et délits commis dans les foires."

[254] Morel, p. 155. Mitchell, p. 67. Huvelin, pp. 393–394. By the mandate of Charles VI, in 1381, the guards of the fairs possess "la juridiction, punition et connaissance en tous cas criminels et civils de tous les marchans ou autres fréquentans les dittes foires et de tous contrats faits et scellés en icelles, et aussi de toutes roberyes, empeschemens et destourdes et injures faites et dites a aucuns marchans ou autres personnes en venant aus dittes foires et en retournant d'icelles foires et ou conduits en icelles, en quelque lieu et par quelque personne que ce soit, sans que autres juges, de quelque povoir et authorité qu'ils soient, s'en puissent ou doivent entremettre, excepté tant seulement nos amez et féaulx les gens tenant nos Grans jours à Troyes, en cas d'appel et non autrement, et avec ce soient tenus tous juges et officiers obéir aux mandemens et lettres scellées du scel desdites foires."

[255] Morel, p. 155.

[256] Huvelin, pp. 394–395.

[257] *Ib.*, pp. 395–396.

[258] Above, p. 160.

[259] Huvelin, p. 402. Morel, p. 166. In France today the merchants elect the judges of the courts of commerce. For the elaborate procedure see *Code de Commerce*, Dalloz ed. (1924), Liv. IV, Tit. I, Loi du 8 décembre 1883, pp. 314–319.

[260] Mitchell, pp. 67–68.

[261] At least in France. Goldschmidt, p. 222.

[262] Huvelin, p. 415.

[263] *Ib.*, p. 418–419. Morel, pp. 157, 205, 214. Goldschmidt, p. 230, n. 157.

in the days of Charlemagne.[264] The court is to judge, in the adopted and almost universally used phrase of Pope Clement V, "de plano, ac sine figura et longo strepitu iudicii," [265] or, as it is later put, "sans longs procès et figures de plaids." [266] The parties to the case must appear in person, and no lawyers are allowed.[267] They must confine themselves to the merits of the case,[268] and adjournments, if any, were short.[269] The Guard submitted the parties to a summary questioning, and in most cases delivered judgment at once, although he might further hold an inquiry in order to determine the exact facts in the case.[270] All the more important obligations passed under the seal of the fairs.[271] This was optional at first, but became compulsory in the XIV Century.[272] After being sealed, in the Middle Ages, a document had an absolute probative force, and the only possible defence was forgery.[273] Unlike the law of Italy and of Provence, in Champagne commercial documents did not have an executive force of their own, unless there was further legal action and the apposition of the seal of a justice.[274] However, letters sealed with the seal of the fairs of

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[264] Huvelin, p. 418, n. 1.

[265] Goldschmidt, pp. 173–174. Huvelin, p. 418. "La procédure des foires est avant tout une procédure sommaire. Il faut que les visiteurs des foires puissent obtenir justice sur le champ, sans longueurs ni atermoiements. Dès longtemps ce principe a prévalu dans les juridictions des marchés. . . . Dans les grandes foires du moyen âge, c'est là une notion qui doit toujours prévaloir. Ainsi, en 1370, le Parlement de Paris renvoie une affaire devant les gardes des foires de Champagne, et les charge de juger *de plano, ac sine figura et longo strepitu iudicii.*"

[266] Huvelin, p. 419. Goldschmidt, p. 236. Morel, p. 205.

[267] Morel, pp. 158, 205.

[268] Morel, p. 157. Huvelin, p. 421.

[269] Huvelin, p. 420.

[270] Morel, pp. 157–158.

[271] Goldschmidt, pp. 230–231. Huvelin, pp. 476–477. "Toutes les obligations les plus importantes sont passées sous scel de foire. A l'origine, l'usage du scel n'est point imposé, et les dettes de foire peuvent être prouvées par témoins. . . . Mais par la suite, l'usage du scel devient obligatoire. Deux causes motivent cette évolution: le souci d'éviter les fraudes, et d'empêcher que les marchands puissent faussement rédiger des contrats comme ayant été passés en foire, alors qu'ils l'auraient été réellement en dehors de la foire; et surtout la préoccupation d'augmenter les revenus du droit de scel."

[272] Huvelin, p. 478. "Ainsi le sceau des foires était apposé, en fait, avant 1326 sur toutes les obligations importantes, en droit, depuis cette date sur toutes les obligations, quelles qu'elles fussent, passées dans les foires de Champagne. Or le sceau, qui est, au moyen âge, le symbole du pouvoir legislatif, administratif et judiciaire, donne aux obligations sur lesquelles il est apposé une force probante particulière."

[273] *Ib.*, p. 479. Mitchell, pp. 110–111.

[274] Huvelin, p. 479.

Champagne had full executory force throughout all France, in this respect resembling letters sealed with the King's seal,[275] but, unlike those sealed with the King's seal, their force extended even to foreign countries, for the following provision is to be found in the statutes of Piacenza of 1336, that the *litteræ nundinarum Campanie et Brie* should have the same probative and executory force as the public documents of the city.[276] If an obligation had passed under the seal of the fairs it was enforceable for thirty years and could be executed at any time on the goods of the debtor, though he himself could not be imprisoned after the lapse of one year.[277] From the XII Century onwards the goods of a debtor were considered as being mortgaged to pay his fair debts;[278] all his fair creditors shared pro rata[279] and creditors outside the fair took what was left,[280] although an unpaid vendor had preference over any other creditor.[281] Regular rules were provided in regard to a debtor, among which we may mention that a majority of his creditors, in respect to number and the sum owed, could come to a composition that would bind the minority.[282] Other fairs copied the rigorous law of obligations as adopted in the fairs of Champagne.[283] We have seen that at an early period the merchants had successfully limited and often abolished the right of reprisals. But this was only in regard to matters arising *outside* the fairs; the system was rigorously maintained as a sanction for debts contracted within the fairs,[284] and was applied in accord with the conception of solidarity that united in interest all the merchants belonging to the same society.[285] In Italy, as in France, this liability was limited to what we would call the corporate resources of the society, and also of the interest in it of the individual member.[286] In the fairs of Champagne, however, this liability of the individual for the social debts contracted there was unlimited,[287] and any member of the society was able to bind it corporately by his own acts.[288] Thus an exceptional guarantee was given to debts contracted within the fairs.

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[275] Huvelin, p. 480.

[276] Goldschmidt, p. 231, n. 160.

[277] Huvelin, p. 475.

[278] *Ib.* p. 481.

[279] *Ib.*, pp. 483, 487, 489.

[280] *Ib.*, p. 481. Goldschmidt, p. 229, n. 156; p. 233.

[281] Huvelin, p. 482.

[282] *Ib.*, pp. 494–495.

[283] *Ib.*, p. 495.

[284] *Ib.*, p. 483. Goldschmidt, p. 232, n. 164.

[285] Huvelin, p. 483. Goldschmidt, p. 284.

[286] Goldschmidt, pp. 283–284. Huvelin, p. 483–484.

[287] Huvelin, p. 484.

When judgment was given execution followed without delay if the debtor or property of his could be found either within the fair or within the county of Champagne.[289] But if he had fled outside the county it was a matter for enforcement by the authorities of the jurisdiction in which he was to be found. To them the Guards at once addressed letters demanding the execution of their judgment. Their requests were pressing and neither negligence nor refusal was tolerated. In the case of either of the latter a demand for justice was made, returnable at a given day, under penalty of prohibition of the fairs. If there was a default, the demand was renewed three times and finally a prohibition was pronounced.[290] We have given, in our Appendix II,[291] the interesting correspondence between the Guards and the Mayor of London in 1299–1300, in which the entire procedure can be followed in detail. Note especially that the Guards do not permit the facts of their judgment to be called into question elsewhere.[292] We do not know the result of this correspondence, but Morel states, upon what authority does not appear, that it resulted in a prohibition.[293] In 1297 such a prohibition was pronounced against Lucca, and in 1298 against Florence.[294] The prohibition was an aspect of the mediæval doctrine of reprisals, of which we shall soon speak,[295] by which all the members of any community were considered as being solidary in interest with one another, both as regarded their debts and their offences.[296] Nor would the merchants ever disobey such a prohibition, for the penalty, if they were found within Champagne, was the seizure and sale of sufficient of their goods to pay the claim in question.[297] "Just as in the rules made by the Italian cities for the decision of questions in which a foreign element is present we can see the germs of some of the rules of private international law, so in this rule we can perhaps see one of the causes which has led to the growth of that department of private international law which is concerned with the validity of foreign judgments." [298] In these prohibitions made to compel the doing of justice, we behold, also, the earliest known economic boycott, although they were seldom used because they were apt to be very unjust and very dangerous.[299] The judgments of the Guards, then, were enforced abroad as well as in Champagne or in France, and their tribunal had an international competence.[300] From their judgments it was possible to appeal to the court of the Grand Jours of Troyes, and from that court to the Parlement of Paris.[301] If the basis for such an appeal was merely dilatory, there was no point to it, for it does not seem to have suspended execution.[302]

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[288] Huvelin, pp. 484–485. Goldschmidt, p. 285, n. 160.

[289] Huvelin, pp. 426–427. "De tous les caractères spéciaux que présente la procédure des justices de foires, le plus frappant est assurément celui qui touche à l'exécution des jugements, et aux moyens de coercition qui l'assurent. Les jugements des grandes foires de Champagne et de Lyon sont exécutés dans toute l'Europe occidentale, et les justices de ces foires ont ainsi une importance internationale. L'exécution des jugements rendus se fait sans délai. . . . L'exécution des sentences des gardes [en Champagne] ne souffre pas de difficulté, car les autres juridictions de Champagne . . . leur sont soumises, elles doivent obéir à leurs *mandements* et *commandements,* sous peine d'amende."

[290] *Ib.,* pp. 427–429. Morel, p. 159. Goldschmidt, pp. 231–232.

[291] Below, pp. 407–413. Also Huvelin, pp. 430–431.

[292] Below, p. 411.

[293] Morel, p. 160.

[294] Goldschmidt, p. 232, n. 164.

[295] Below, p. 224.

[296] Huvelin, pp. 427–428. "Mais lorsqu'il s'agit de juridictions qui dépendent non pas de l'ancien ressort du comté de Champagne, mais de la couronne de

The fairs were also granted various privileges in order to attract merchants to them. Gambling and other amusements were specially permitted,[303] and the price of food was regulated.[304] The prohibition against usury was relaxed and it was permitted to charge up to 15 per cent for loans made within the fairs.[305] We have already men-

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France ou de couronnes étrangères, il ne peut plus être question de mandements ni de commandements; les gardes des foires n'ont sur elle, en droit, aucune autorité. Mais, en fait, ils aboutissent au même résultat pratique, grâce à la sanction puissante qu'ils peuvent donner à leurs requêtes. Cette sanction, c'est la *défense des foires,* c'est à dire l'interdiction de venir aux foires et d'y faire le commerce prononcée contre tous les ressortissants des justices qui ont refusé de faire droit aux requêtes de la juridiction des foires. C'est là une forme particulière de ce droit de représailles qui, aux moyen âge, rendait solidaires les uns des autres les habitants d'un même pays à raison de leurs dettes ou de leurs délits."

[297] *Ib.,* p. 429.

[298] Holdsworth, *H.E.L.,* V., p. 98.

[299] Huvelin, p. 430.

[300] *Ib.,* p. 432. "Les jugements du tribunal des gardes des foires étaient donc executés en fait aussi bien à l'étranger qu'en France. Ce tribunal avait une compétence internationale." Also *ib.,* p. 426.

[301] Morel, p. 162. Goldschmidt, p. 234. Huvelin, p. 425.

[302] Huvelin, pp. 425–426.

[303] *Ib.,* p. 438.

[304] *Ib.,* p. 439.

[305] *Ib.,* pp. 439–441.

tioned that the law of reprisals was suppressed as regarded those coming and going to the fairs.[306] The right of *aubaine,* under which the state seized the property of a deceased foreigner, was sometimes abandoned,[307] and, finally, legal actions and measures of execution upon the person or property of merchants who were within the peace of the fair were suppressed, whenever it was shown that their cause arose outside of the peace of the fairs. Thus the fair became a sort of place of asylum.[308] This principle was weakened in the later Middle Ages,[309] and there was always one great exception—it did not apply to an obligation confirmed by an oath, which, by a legal fiction, was thought to be a tacit renunciation of all exceptions and privileges, just as nowadays, for instance, one can renounce the benefit of the Statute of Limitations.[310]

Just as the various states of Europe had their own separate currencies,[311] so did they have their own separate measures and weights. In certain respects all were admissible at these fairs, but standards were adopted there which won universal acceptance. The coinage and monetary standard of Provins was in use all over Europe,[312] while the pound of Troyes is in use today, as it was then, to weigh money and precious metals.[313] While many goods were sold by measure or by the piece, others were sold by weight, according to the standard weight of the fair—they were sold *avoir-du-poids.*[314] Among the most important merchandise sold at the fairs were the cloths and woollen goods of Flanders, England, and Italy.[315]

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[306] Huvelin, pp. 441–443. Goldschmidt, p. 228.

[307] Huvelin, pp. 443–445. Mitchell, pp. 86–87. The foreign mediæval merchant was generally subject to the right of *aubaine,* whereby the feudal overlord or the king (whichever was more powerful) seized all the merchant's property within their dominions at the time of his death, and this even though he might have made a will. The Papacy and the Empire abolished this right, but it was especially strong in France, though it was abolished for some categories by treaty, particularly the fairs. Goldschmidt, p. 121.

[308] Huvelin, pp. 445–446. "Le marché constitue une sorte de lieu d'asile. Les crimes qui ont été commis, les obligations qui ont été contractées en dehors de la paix et du conduit du marché, ne peuvent entraîner de poursuite tant que les criminel ou le débiteur sont protégés par cette paix ou ce conduit. . . . Le marché est un lieu inviolable; et la paix n'en saurait être troublée, même pour une cause légitime." See also *ib.,* pp. 447–541, and Goldschmidt, pp. 228–229 and n. 153. Private arrest was prohibited as well as that by the public authorities; Huvelin, p. 451. "Cette franchise ne s'applique qu'à l'arrêt qui a sa cause dans une dette ou un délit antérieurs à l'entrée du marchand dans la paix ou le conduit des foires. Les textes réservent toujours avec le plus grand soin le cas où la dette ou le délit ont pris naissance dans la paix des foires: dans ce cas, la saisie privée, la contrainte par corps, l'arrêt reprennent leur ancien intérêt."

[309] Huvelin, p. 452.

[310] *Ib.,* p. 453.

[311] *Ib.,* p. 541. Goldschmidt, p. 225.

[312] Goldschmidt, p. 225 and n. 137.

[313] *Ib.,* p. 225 and n. 136.

In another fashion the fairs contributed to the facilitation of commerce, since, beginning with the XIII Century, one finds the commencement of a regular mail service in the use of the couriers sent to and from the fairs.[316]

Finally, the fairs had a great financial importance. They were banking centers and centers of exchange,[317] the places where all payments were made and all transactions arranged, even though they were completed outside:[318] Goldschmidt calls them the home of the exchange of Europe.[319] We have just spoken of the great diversity of European money. Nearly all of it passed current at the fairs,[320] where the money-changers were appointed by the Guards.[321] It was the changers who determined the course of the exchange,[322] and they were chiefly Italians and Jews.[323] They also dealt in bills of exchange, which appear at the beginning of the XIII Century.[324] They were not, as now, addressed to a third person, but the drawer promised to pay a given sum in another place.[325] The order clause appeared quite early, as regards the payee,[326] and the drawer often stipulated to pay by his agent.[327] In their primitive form bills of exchange certainly existed in the fairs of Champagne, which were the central places for payment in the Middle Ages. Even most of the obligations contracted outside of the fairs were made payable there, such as those of the king and of the state.[328] From and after the XII Century this was the custom, and it continued on in other fairs long after those of Champagne had fallen into decay.[329] The bankers met at those fairs, and true clearing house operations took place, balances at distant places being exchanged for balances at near places, or carried forward, to obviate the dangers and expense of transport.[330] With this transfer of balances there is connected a simple form of discount, dating from the beginning of the XIII Century. [331]

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[314] Huvelin, pp. 253, 526, 548.

[315] *Ib.*, pp. 283, 503, *et seqq.*

[316] *Ib.*, p. 22. "Les foires . . . ont contribué pour une bonne part au perfectionnement et au développement de moyens de relations plus faciles et moins coûteux. . . . C'est ainsi . . . que la poste aux lettres, dont les commencements remontent au XIII^e siècle, entra dans les moeurs par l'usage des courriers envoyés aux foires du Champagne." Goldschmidt, p. 333. "Der Nachrichtenverkehr wird zum erheblichen Theil durch regelmäszigen Botendienst bewirkt, bereits im 13. Jahrh. finden sich Anfänge regelmäsziger Briefpost."

[317] Huvelin, p. 546. In old French "change" means a merchant's booth.

[318] *Ib.*, p. 254.

[319] Goldschmidt, p. 226. "Die Champagner Meszplätze [sind] gleichsam Europäische Wechseldomizile."

[320] Huvelin, pp. 541–542. Goldschmidt, p. 225.

[321] Huvelin, p. 544.

[322] *Ib.*, p. 543.

[323] *Ib.*, p. 544.

[324] *Ib.*, p. 552. Goldschmidt, pp. 225, 407.

[325] Huvelin, p. 553. Goldschmidt, pp. 417–427—many of the earliest documents from 1156 onwards are cited in full there.

[326] Huvelin, p. 553. Goldschmidt, p. 428—"tibi vel tuo misso, tuo certo nuntio," etc.

Such were the great fairs of Champagne. The privileges and the internal organizations of the fairs constituted a very complete and ingenious system, the starting point in the evolution of the special law of the fairs, and all the more important because of the close commercial relations of the fairs with all that part of Europe from Flanders and England to Italy. The fair courts exercised a great influence upon the development of the modern Continental courts of commerce, for they were the first special courts, just as the peace of the fairs was the true precursor of the modern peace of commerce. But this influence was not exclusive. The maritime courts also had influence, especially, perhaps, in the field of procedure, and mention must be made of the consul-judges, all culminating in L'Hopital's true court of 1563.[332]

With the latter half of the XIV Century the fairs began to decline both for political and for economic reasons.[333] In the last days of the Counts of Champagne burdensome taxes had been laid on the traffic in cloths, and when the kings finally straightened matters out it was too late, for commerce had found other channels.[334] This change in the current of commerce was due to political reasons, too. While

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[327] Huvelin, p. 553. Goldschmidt, p. 428—"per nos vel nostrum missum."

[328] Huvelin, pp. 554–555.

[329] *Ib.*, p. 556. "C'est un usage très générale, depuis le XII^e^ siècle, de souscrire des effets de change payable en foire. . . . Plus tard, après la décadence des foires de Champagne, les foires de Lyon, Anvers, les foires génoises deviennent à leur tour le siège central des règlements de change."

[330] *Ib.*, pp. 557–558. Goldschmidt, p. 411.

[331] Huvelin, pp. 559, *et seqq.*

[332] *Ib.*, pp. 434–435.

[333] Goldschmidt, pp. 234–235. Huvelin, pp. 241, 255.

[334] Huvelin, pp. 255–257.

Champagne remained a neutral market in the heart of Europe its prosperity was favored by its independence. But when it had been absorbed by the Kingdom of France it became involved in all the difficulties and interminable wars of the period,[335] and it suffered especially from the effects of the Hundred Years' War.[336] The Italian commerce was no longer discharged at Aigues Mortes, to ascend the Rhône and descend the Seine. Thenceforth it followed the valley of the Rhine, or communicated directly with Flanders and with England by sea.[337] By the XV Century the fairs of Champagne had lost their exceptional importance and their primitive character of a meeting-place for commerce that had come by land. They were now the center from which were settled transactions made outside them; they were the great places of payment of western Europe.[338] Important as were the mingling of the Latin and Germanic worlds of commerce in the fairs of Champagne, other aspects were even more important. Here for the first time were assembled together all the interests of European commerce under the protection of the same strong law and of the same tribunal. There was a central authority from which merchants could demand, usually successfully, protection against attempts made upon their rights, a fact of general historical importance, and one hardly to be surpassed by any other in all the development of the commercial law of the Middle Ages.[339]

We can mention but briefly the fairs of Lyon, which were established in 1419, [340] since they flourished outside of our period [341] and since they were infrequently attended by the Flemings and by the English.[342] The privileges enjoyed by the fair court of Lyon were copied from those of Champagne.[343] Later it broadened its competence, at the end of the XVI Century, to include all commercial cases, outside or inside the fairs, and thus it was the link between the old fair courts and the modern French commercial courts.[344] Finally, the merchants succeeded in getting the jurisdiction of the fair into their own hands.[345] Lyon became the financial capital and the clearing house of western Europe,[346] and the first public bank was founded here in 1543.[347] Finally, in November, 1563, L'Hopital founded the jurisdiction of the judges-consuls at Paris,[348] a true court of commerce presided over by judges elected by the merchants.[349] Thus were founded the modern French courts of commerce.[350] Here and there some details were changed, but none of the essential dispositions, and the old edict of 1563 still remains the fundamental law of the modern French institution.[351] This court of the judges-consuls was also a court of summary procedure, and, in one respect at least, it was a century and a quarter ahead of English law. From its inception it had jurisdiction over all bills of exchange, whether or not the suitors were merchants, since the making of such a bill was considered to be an act of commerce between any persons whatsoever.[352]

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[335] Huvelin, p. 257.

[336] *Ib.*, p. 241.

[337] *Ib.*, p. 257. Goldschmidt, p. 235.

[338] *Ib.*, pp. 283–284.

[339] Huvelin, p. 258. Goldschmidt, p. 234. "Die Bedeutung der Champagnermessen geht über die an sich wichtige Vermittelung der romanischen und germanischen Handelswelt hinaus. *Hier zuerst werden die Interessen des gesammten europäischen Handelsstandes auf den bloszen Titel des Meszbesuches hin durch das gleiche strenge Recht und Gericht des Meszplatzes gewahrt.* Es gibt eine *Centralbehörde,* von welcher Kaufleute *aller* Nationen Schutz gegen Vertragsbruch und sonstige Rechtsverletzung erstreben und in der Regel erlangen—an *universalgeschichtlicher* Wichtigkeit läszt sich in der Gesammtentwickelung des mittelalterlichen Handelsrechts dieser Thatsache schwerlich eine andere vergleichen."

[340] Goldschmidt, p. 235. Huvelin, pp. 286, 403.

[341] Goldschmidt, p. 235. "Ihre Blüthe gehört erst dem 16. und 17. Jahrhundert an."

[342] Huvelin, p. 290.

We must now turn to the general North of Europe, and especially to Germany, whose legal development was considerably behind that of Italy and of France.[353] We shall consider briefly the origin and the formation of municipal law in these parts of the world during the Middle Ages. What we have to say will be true not only of the cities of Germany but also of northern France and of the Low Countries: it does not affect the South of France or Italy.[354] On the other hand, there are many parallels to early England.

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[343] Huvelin, p. 286, n. 1. Morel, p. 169. "Le tribunal lyonnais, à l'origine, aurait été une simple reproduction des tribunaux que nous avons trouvés précédemment dans les villes de Brie et de Champagne."

[344] Morel, pp. 184–186.

[345] *Ib.*, pp. 173–180. Huvelin, pp. 404–408. Goldschmidt, pp. 236–237. Mitchell, pp. 68–69.

[346] Goldschmidt, p. 235. Huvelin, pp. 291, 564. "L'importance des foires de Lyon comme foires de change a été hors de pair dès la fin du XVe siècle, et elles ont tendu de plus en plus à devenir exclusivement des places de paiement. Les paiements de chaque foire constituaient une période particulière, plus longue que la foire elle-même."

[347] Goldschmidt, p. 235.

[348] Morel, p. 195. Goldschmidt, p. 236. Mitchell, p. 83.

[349] Morel, pp. 196–197.

[350] Mitchell, pp. 69, 82.

[351] Morel, pp. 203–204.

[352] *Ib.*, p. 199. "Les juges-consuls tranchaient les procès se référant à des lettres de change même entre non-marchands, car la lettre de change était considérée comme un acte de commerce entre personnes quelconques."

[353] Above, p. 136.

If we turn back to the period from the VII to the X Centuries, the period of transition following the dissolution of the Roman Empire, we see that there were no cities in the true sense of the word.[355] But in the growth of many of the cities one can assign a preponderant influence to its commercial relations, and especially to the market law.[356] From the one source there grew the municipal liberties and the market law, due chiefly to economic causes—the franchises obtained by many places were closely attached to their prosperity, which was founded on commerce.[357] The law of the market and the law of the merchants was identical, and the former eventually became the law of the city.[358] At the beginning of the Middle Ages the market, both weekly and daily (when it existed) was not, as it is today, entirely agricultural and alimentary.[359] At that time communications were often restricted, and each community had to be self-contained.[360] The market was the seat of all the commerce and manufacture in the neighborhood.[361] When a market was granted to a place it was equivalent, as early as 888, to authorizing its inhabitants to engage freely in commerce and in business, as a text of Hamburg shows.[362] At the market the artisans had their benches or booths, and with them there were established such early merchants as there were, the two groups together constituting the *mercatores* or *negociatores*. They had their special law, the *ius mercatorum, mercati,*[363] and they came to constitute powerful and organized corporations. Since these *mercatores* included practically all the population of the place, their corporation was, in an anticipatory way, a sort of a municipal body; they became citizens and the market a city.[364] The words *cives, burgenses,* and *mercatores,* and *civitas* and *villa*

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[354] Huvelin, pp. 212–213.
[355] *Ib.*, p. 211.
[356] *Ib.*, p. 212.
[357] *Ib.*, p. 213.
[358] *Ib.*, p. 214.
[359] *Ib.*, p. 214.
[360] *Ib.*, pp. 214–215.
[361] *Ib.*, pp. 216–217.
[362] Goldschmidt, pp. 122–123, n. 97. Huvelin, pp. 216–217.
[363] Goldschmidt, p. 127, n. 113.
[364] *Ib.*, p. 113.

forensis were employed as synonyms both by writers and in the law.[365] The market was the first franchise granted to the old groups, and the right of doing business was the first liberty. From this there developed a privileged situation for these groups, and the organization of the market was the embryo of the organization of the city.[366]

According to the charters of the Middle Ages, cities established at about the end of the XI Century had four characteristics, each one of which was the outgrowth of corresponding elements in the organization of the markets.[367] The first was the permanent peace of the city, which was the temporary peace of the market now become perpetual. The city was thought to be a permanent market, and the truce of the market became a true peace, justice being available at all times, instead of at certain times.[368] The original peace of the market extended beyond the market's boundaries. It protected both merchants and visitors as they came and went, and, in a way, thus incorporated itself in the person of the individual. As regards the market, the temporary peace tended to become permanent, for walls were put up about it and the Church and the Emperor continued their protection as the periodic commerce slowly became permanent.[369] The protection next extended itself in space and went outside the market to the homes of the merchants, just as it went still further away to the doors of those coming from or going to the markets. By the end of the X Century the ban had been extended to a league about the place (*banleuga, banlieue*).[370] The market cross was the traditional symbol of this peace, both in the market and, later, in the city.[371] From this special peace of both market and city it resulted that even the legitimate authorities could not interfere to make arrests for offences committed or debts contracted elsewhere. There was created a true right of asylum, just as in the early fairs.[372] The second characteristic was the law of the city. There was a special law of the markets, of which we shall presently speak, and, among other characteristics, it made no distinction between persons, in the interests of commerce, free or servile, villain or noble. It was the same in the city. It was not even necessary to be free in order to hold property in the city, *iure forensi.* But the jurisdiction of the city was not exclusive; it did not invariably extend to everyone.[373] Only those who were permanently settled within the territory of the city enjoyed the advantages of this peace and were within the jurisdiction of the city court as being true bourgeois. All others were still under the feudal justice.[374] The justice of the city, for them, was restricted to affairs of commerce, and so the law of the city, borrowed from the law of the market, was essentially a law of commerce.[375] With the law of the market is connected the third point, the justice and jurisdiction of the city. The justice of the market and the justice of the city are the sanction of the peace; they enforce the obligations contracted in the market or in the city, and they punish certain offences committed there.[376] The judge of the city was the former judge of the market without any extension of his powers.[377] The competence of the city court was essentially that of the limited market court, and usually did not go beyond matters of commerce. Excepting a few specified offences, the criminal jurisdiction remained with the feudal courts.[378] The final characteristic was the city council, magistrates called *iurati, pares,* or *scabini,* chosen among the bourgeois, placed at the head of the city and forming a college possessing certain attributes of jurisdiction.[379] An analogous council had previously had certain rights of jurisdiction over the market, and, together with the officer of the count (the *villicus* or *centenarius*), they had looked after the justice, the police, and the administration of the market.[380] The *villicus* became the mayor of the city and at the head of the council, which, by various encroachments, became a true tribunal of commerce, representing the gild corporations, renewing its members by coöptation, and deriving its authority from the commune rather than from the feudal overlord.[381] Finally its members come to be chosen by the gilds.[382] It was the development of commerce that caused the periodic commerce to be permanent, and thus developed the liberties of these cities from those of the markets.[383] The municipal law received its only impress from the needs of commerce. Beside royalty, feudalism, and the Church there had been born a fourth social force destined, some day, to absorb the other three.[384] Throughout the XIII, XIV, and XV Centuries these courts continued to develop and the courts of commerce developed from the city courts.[385]

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[365] Huvelin, pp. 217–220. Goldschmidt, pp. 129–130.

[366] Huvelin, pp. 220–221.

[367] *Ib.*, p. 221.

[368] *Ib.*, p. 221. Goldschmidt, p. 130.

[369] Huvelin, pp. 222–223.

[370] *Ib.*, p. 224.

[371] *Ib.*, pp. 223–226.

[372] *Ib.*, pp. 226–228.

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[373] Huvelin, pp. 228–229.

[374] *Ib.*, pp. 229–230.

[375] *Ib.*, p. 231. Morel, p. 118. As early as the X Century the charters enumerate certain matters which are regarded as commercial and are expressly taken away from the jurisdiction of the ordinary judges. Goldschmidt, pp. 126–127, 130. "Die neue bürgerliche (städtische) Verkehrs-und Rechtswelt trägt eine merkantile Signatur."

[376] Huvelin, pp. 231–232.

[377] *Ib.*, p. 232. Goldschmidt, p. 129.

[378] Huvelin, pp. 233–234.

[379] *Ib.*, p. 397. "Ce n'est pas avant le moyen âge que nous trouvons des juridictions commerciales émanant du corps des marchands. La première de ces juridictions est assurément la juridiction municipale. Nous avons montré en effet, d'une part, que les juridictions municipales des conseils de ville étaient des juridictions commerciales issues des anciens tribunaux de marchés; et, d'autre part, que les conseils de ville, d'abord nommés par le seigneur, n'avaient pas tardé, dans un grand nombre de cas, à être élus par les bourgeois (les marchands) ou recrutés par cooptation: ces conseils de ville constituent dès lors, peut-on dire, les premiers tribunaux de commerce. Quant aux juridictions des corporations marchandes, c'est surtout en Italie qu'elles se développent d'abord."

The commercial courts in Germany came later than in Italy or France. The reason is that in Italy and France commercial courts were necessary to avoid the delays of the Roman Law, while in Germany causes were tried orally and there was seldom delay. But with the reception of the Roman Law in Germany during the XIV and XV Centuries justice became not only blind but lame, and the merchants demanded the creation of speedy courts.[386]

In the continuation of the development of the city courts into commercial courts we can see certain slight resemblances to Italy. In the XIII Century the Burgraves, who administered justice in the Emperor's name in the Imperial cities, were overworked. Like the

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[380] Huvelin, pp. 234–235.

[381] *Ib.*, pp. 236–237. Mitchell seems altogether to overestimate the importance of these courts in omitting to mention those of the Italian cities, p. 27, "to these favourable conditions—the rise of local jurisdictions in markets and fairs free from the effective control of the central power and the existence of a merchant class distinct from the general mass of the population—the origin of the Law Merchant is due."

[382] Huvelin, pp. 237–238.

[383] *Ib.*, p. 238.

[384] *Ib.*, p. 239.

[385] Mitchell, p. 28. Morel, p. 97. "En beaucoup d'endroits, la ville ayant eu pour origine une église autour de laquelle se tenait un marché, du tribunal de marché est sorti le tribunal urbain. Cette circonstance, on le comprend, devait singulièrement faciliter l'admission des négociants dans ce dernier tribunal. Or, nous allons voir que c'est précisément à la suite d'une transformation du tribunal urbain, suivie d'un dédoublement, qu'est né le tribunal de commerce."

[386] Mitchell, pp. 69–70.

Italian *consules de communi,* they possessed most varied functions, including those of government, administration, and justice. To all these tasks they were unequal.[387]

The commercial classes rode into power in Germany as a result of the conflict between the Burgraves and the Imperial authority, when the Emperor supported the merchants in order to counterbalance the power of the Burgraves.[388] Little by little the merchants made their way, at first advising the courts, then preventing the courts from deciding contrary to their advice, next reshaping the courts and modifying procedure in accord with their wishes, and finally completely separating the commercial court from the old court.[389] At the beginning of the XIV Century the mercantile influence was plainly perceptible on the city court, for many cases were settled with great rapidity, especially all those cases in which foreigners were concerned.[390] Special care was taken to make justice prompt and speedy for foreigners, and immediate execution was issued upon judgment. There also were special remedies against foreigners if they were suspected of acting in bad faith.[391] Again, in the matter of debts in writing, whatever the nationality of the parties, no appeal was permitted and the procedure was most summary. It was in this acceleration of the procedure that the city courts tended more and more to grow like the commercial courts.[392] Towards the end of the XIV Century this movement in favor of a summary jurisdiction underwent a temporary set-back, due to the influence of the jurists.[393] About 1350 the renascence of the Roman law commenced in Germany, and the jurists practically got control of the courts and complicated the procedure, slowing down their speed most materially.[394]. At first the mercantile class worked quietly against this situation, but when their business was put in danger by the delays of justice they changed their attitude and worked against it openly, persuading the Emperors either to grant them special magistrates or else to intervene and to simplify the procedure of the common law courts in commercial matters.[395] We must note that it was upon procedure that the jurists had exercised their influence; it was chiefly upon procedure that the merchants first brought their efforts to bear and the first commercial courts are the result of their reaction against the jurists.[396] While, therefore, procedure was quite uniform, the organization of the courts varied in each city. The chief thing which the merchants desired was to have a prompt and serviceable justice.[397] From the second half of the XIV Century the merchants began to attempt reforms, but timidly and by a development from that which they had already proved to be good and useful in practice.[398] With the desire of escaping as much as possible from the common law jurisdictions they sought to create new institutions. Towards the end of the XV Century there appear special courts such as the Fronboten at Nuremburg, with a summary procedure. At this court a register was kept in which a plaintiff entered the facts of his case and asked for relief, submitting, also, a résumé as a separate document. This was sent to the defendant, who had to appear before the magistrate on a set day and state his defence orally. The sentence was given at once.[399] In all these early courts one did not have to have the status of a merchant in order to give them jurisdiction, but in the midst of the XV Century this came about in the erection of the court at Frankfort, where, under the appearance of an arbitral tribunal, we meet with a true mercantile jurisdiction.[400] It was not a true arbitral court, for the rules of reference were fixed and not variable according to the wishes of the parties. Exceptions, replies, and counter-replies were forbidden and pleading had to be conducted "absque strepitu judicii." Finally the advice of jurists was not sought, but similar previous decided cases were considered, which were carefully preserved and which became of authority in commercial matters,[401] so that this court followed a sort of case law system. There were also a few jurisdictions of a special sort, of which the one at Regensburg is typical. We shall speak in a moment of the Hansgraf, appointed, and not elected by the merchants, who governed and judged them in their travels from city to city, except when within their own city. At Regensburg he came to exercise a jurisdiction within the city limits, as regards commercial cases, and his judgments were apparently so acceptable that the inhabitants of the city would declare their cases to be mercantile when they were not, in order to fall within his jurisdiction, just as later pleaders in England would lay their venue falsely in order to fall within the jurisdiction of the common law courts and to avoid the Admiralty. This court at Regensburg was also a true commercial court.[402]

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[387] Morel, p. 97.

[388] *Ib.*, pp. 97–98.

[389] *Ib.*, pp. 98–99.

[390] *Ib.*, pp. 99–100, 116. "Au XIV^e siècle, les relations entre marchands italiens et marchands allemands ayant pris une extension considérable, les règles qui avaient fait leur apparition en Italie vers 1300, commencèrent à leur tour à être suivies d'abord dans les cités de l'Allemagne méridionale, puis dans l'Allemagne entière. . . . Les nouveaux principes, loin d'exclure et de détruire ceux qui existaient déjà, s'amalgamèrent avec eux et la procédure commerciale ainsi fondée présenta dès lors en tous lieux et jusque dans ses moindre détails, le triple caractère de simplicité, de rapidité et d'économie."

[391] *Ib.*, p. 100.

[392] *Ib.*, p. 101.

[393] *Ib.*, pp. 101–102.

[394] *Ib.*, pp. 102–103.

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[395] Morel, pp. 103–104.

[396] *Ib.*, p. 104.

[397] *Ib.*, pp. 41–42, 49. Also p. 117.

[398] *Ib.*, p. 105.

[399] *Ib.*, pp. 106–107.

[400] *Ib.*, p. 107.

[401] *Ib.*, pp. 107–108. Mitchell, p. 70.

Of the German fair jurisdictions there is little to say, for their development was at least a century behind that of France. Their earliest beginnings seem to date from the end of the XII, and the XIII Centuries.[403] Their growth and development dates from a somewhat later period, the XV and XVI Centuries. The most important was that of Frankfurt-am-Main, where, in the XVI Century, merchants gathered from Flanders, England, France, Poland, Italy, Hungary, and Russia.[404] Unlike the French fairs, it was not especially a place of payment, but devoted itself to the sale of merchandise, which gave it a more stable foundation.[405] The other German fairs did not become important until the XVII Century.[406]

We have already spoken of the dangers to which travellers in the early Middle Ages were subject and of how they were compelled to travel in convoys and in caravans in order to ensure their own safety.[407] In this M. Morel sees the origin of the Gilds of the Merchants, which he traces back in part to the antique federations of consanguinity.[408] We have seen how, in Italy, the merchants carried their laws with them wherever they went, and decided their disputes by their own judges. Such was the case in Germany, where there was created a new official in response to this need—the Hansgraf, or Count of the Hansa.[409] Until the end of the XII Century the commerce of the country had been in the hands of foreign Jews,[410] but when the Germans themselves began to share in their own commerce the Hansgraf also appeared, being first mentioned in 1190. Like the Italian *consules mercatorum,* the Hansgraves were placed at the head of the merchants whose interests and whose commercial privileges they protected and whose commercial affairs they judged.[411] On the other hand, the Hansgraves were usually appointed by the count or the prince and were not elected by the merchants; furthermore, they had no fixed post, but travelled about with the merchants from place to place.[412] Their duties were not only judicial but were also diplomatic and administrative.[413] When the Hansa had been constituted [414] in the XIII Century with more than two hundred cities as members, its first care was to negotiate with the sovereigns of different states in order to obtain from them the privilege of maintaining special judges wherever there were many members gathered together, an effort in which it was most successful.[415] And as the Hanseatics enjoyed even greater privileges abroad than they did at home we must speak briefly of them.

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[402] Morel, pp. 108–109. Mitchell, p. 71.
[403] Huvelin, p. 281.
[404] *Ib.*, p. 299.
[405] *Ib.* p. 299.
[406] *Ib.*, pp. 299–300.
[407] Above, p. 158.
[408] Morel, p. 119.
[409] *Ib.*, pp. 119–120.

In England, to which we shall later refer at more length, the Hansa merchants had united by the end of the XIII Century and possessed a great central office, the Steelyard, responsible only to the capital of the League at Lübeck. Special privileges were granted by statute and by charter. Judgment was to be swift and equitable. At first, in 1303, they were to be tried by the local courts, but a little later on in the same century they were granted a separate jurisdiction in all suits concerning Hanseatics. If the case was between an Englishman and a Hanseatic it was settled by two German merchants appointed by one of the Aldermen and by two English townsmen chosen by the English municipal authorities. The *lex loci contractu* was to prevail, and the appeal lay outside of the realm, going to Lübeck.[416] In

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[410] Goldschmidt, pp. 106–110.

[411] Morel, p. 120.

[412] *Ib.,* p. 121.

[413] *Ib.,* p. 122.

[414] Goldschmidt, pp. 114–116.

[415] Morel, p. 123.

[416] Silberschmidt, p. 18. Worms, pp. 113–114. Morel, pp. 123–125. "En Angleterre, les Hanséates avaient, outre un comptoir central à Londres, une série de comptoirs secondaires, parmi lesquel il faut citer en première ligne ceux de Boston et de Lynn. Tous ces comptoirs étaient gérés par diverses compagnies de marchands, les unes de Cologne, d'autres de Hambourg, d'autres de Brême, etc. Vers la fin du XII^e siècle, ces compagnes s'unirent

Norway, Sweden, and Denmark the German merchants were freed from the necessity of being judged by the local law or from appearing before the local judges when the dispute did not concern a native. In these countries, and also in the Low Countries, they were permitted to choose their own magistrates and to decide their commercial suits among themselves.[417] In France, when there was a dispute between a native and a Hanseatic, the dispute came before the maritime court and was settled by a simple and summary procedure.[418] In these jurisdictions the essential characteristic that distinguishes them from those native to Germany is that they rest upon the principle of association. At home the German gilds did not possess a part of the powers and privileges of those in Italy, and they only acquired them when they went abroad, for then they were as strong as they were weak at home. The Hansa was really a sort of an expatriated gild, of which the Hansgraf was the magistrate.[419]

Finally, we must briefly consider the fairs of Flanders and those that bordered on the English Channel. These fairs had existed since

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et formèrent la Compagnie générale des marchands allemands affiliée elle-même à la Grande Hanse, dont l'administration siégeait à Lubeck.

"Pourvues dès lors d'un conseil dirigeant, qui résidait à Londres, au Stahlhof, elles ne cessèrent de demander pour leurs adhérents des privilèges de juridiction. Une charte d'Edouard I^{er}, accordée en 1303, leur donna une première satisfaction. De fortes peines étaient décrétées contre le magistrat négligent qui ne liquiderait pas rapidement les procès auxquels étaient intéressés des étrangers. Les litiges engagés entre Allemands et Anglais devaient être jugés d'après la loi du lieu où le contrat avait été passé.

"Les Hanséates ne se contentèrent pas de ces mesures, pourtant libérales. Sous Edouard II et Edouard III, ils réclamèrent tant et si bien, qu'un acte du parlement anglais finit par les appeler à la magistrature consulaire du pays.

"A partir du XIV^e siècle, l'administration de la Hanse intervient dans tous les procès commerciaux où les marchands allemands se trouvent mêlés. Seulement son rôle est plus ou moins large suivant les cas. Si le litige concerne exclusivement des Allemands, l'aldermann de la ville où réside le défendeur, examine seul l'affair et le juge. Si li litige est entre Allemands et non Allemands, un jury mixte est constitué. Il est composé de deux négociants allemands désignés par l'aldermann et deux bourgeois anglais choisis par les autorités municipales anglaises. Les quatre jurés examinaient l'affaire en sé référant, comme le portait déjà la charte de 1303, aux règles du lieu où le lien de droit s'était formé. Ils statuaient sommairement '*levato velo,* dit Marquardus, *ac sine strepitu et figurâ judicii, citius et compendiosius quo fieri poterit.*' L'appel, si appel il y avait, était porté à Lubeck, la ville où délibérait le conseil général de la Grande Hanse."

[417] Morel, p. 125.

[418] *Ib.*, p. 126.

[419] *Ib.*, p. 127.

the IX and X Centuries in the shape of local markets where barter and exchange were necessary because of the scarcity of money.[420] The true fairs seem to date from the XI Century, and from the XII to the XIV Century the fairs of Flanders were very prosperous.[421] That of Thourout is the earliest in date and also served as the archetype for the rights and privileges of the other fairs in Flanders.[422] In the XIII Century the fair of Bruges began to supplant that of Thourout, and from Bruges the supremacy moved to Antwerp in the XV Century. The fairs of Ypres, Ghent, and Lille should also be mentioned.[423] The commercial relations of the fairs of Flanders were even more widespread than those of Champagne, to which they were the successors, for they included Germany, Italy, Holland, Britain, the Northern Hanseatic cities (such as Bergen in Norway, Wisby, and Nijni Novgorod in Russia), Denmark, Hungary, Bohemia, Poland, Bulgaria, Navarre, Aragon, Castile, Leon, Portugal, Morocco, Tunis, Majorca, Sardinia, Constantinople, Jerusalem, Armenia, and Tartary.[424] And it might be noted that in Flanders, too, the fairs owed their creation and success to the wise measures of a line of able counts.[425] With their wide commercial connections these fairs succeeded to the important place formerly held by the fairs of Champagne.[426] The same goods were sold in them,[427] and the same sort of law was administered in much the same way. For our purposes they are important because they were attended in great numbers by the English,[428] who must there have become acquainted with the more recent developments of commercial law.

Finally, we must mention three fairs in towns which were really economic dependencies of England, since they were staple towns and were chiefly concerned with the export and import of merchandise from England. These were the fairs of Calais, Boulogne, and Abbeville.[429]

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[420] Huvelin, pp. 259, 538.
[421] *Ib.*, pp. 258–259.
[422] *Ib.*, pp. 244, 261–262.
[423] *Ib.*, pp. 261–263.
[424] *Ib.*, pp. 264–265.
[425] *Ib.*, p. 266.
[426] *Ib.*, p. 264.
[427] *Ib.*, pp. 265–266.
[428] *Ib.*, p. 290.
[429] *Ib.*, p. 271.

PART II

THE MERCHANT AND HIS LAW MAKING

We now come to the second part of this chapter, which deals with the merchant and with his power to alter the law either by direct legislation or by the slower movement of custom.

Our first task is to discover what a merchant is. In the mediæval days, and until the year 1666 in England,[430] to be a merchant was to possess a special status. The same standard was in use then, and later, as is in use in France at this day: a merchant was one who habitually engaged in acts of commerce.[431]

In the customs and customary law of the body of merchants are to be found the germs of many principles of our modern law, such as contracts, sales, commercial paper, insurance, the bearer clause in negotiable paper, partnership, the corporation law of the Continent, and trademarks.[432] Now we have previously seen that by far the largest element in the body of the maritime law was either created or modified by custom. Such was the case with the law merchant, which was also mostly customary law.[433] It is possible to give a long list of citations in regard to *usus* and *consuetudo* as employed in the maritime law,[434] and it is equally possible to multiply references of this sort in respect to the commercial law.[435] We have such a reference in the late IX Century,[436] in Hamburg, and there are many references to be found in the charters issued by the Emperors during the X and XI Centuries.[437] In the XI and XII Centuries there are also many similar references to be found in the records of the

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[430] *Woodward* v. *Rowe*, 2 Keb. 132; and cf. *Sarsfield* v. *Witherby*, (1690), Carthew, 82.

[431] Lattes, p. 81. The general rule in mediæval Italy was the habitual exercise of trading "non mancano frequenti accenni all' esercizio abituale del traffico per costituire la professione di commerciante." Modern France, 1924, *Code de Commerce*, Liv. I, Tit. I, Art. Ier: "Sont commerçants ceux qui exercent des actes de commerce, et en font leur profession habituelle." Also Gross, I, p. 157. In mediæval Italy, besides this definition, it was necessary to have one's name entered in a gild register—Goldschmidt, p. 240.

[432] Mitchell, p. 34. 16 *Ency. Brit.* p. 300. 24 *Ib.*, p. 535. Goldschmidt, p. 242.

[433] Mitchell, p. 10. Goldschmidt, pp. 156–158.

[434] Ashburner, pp. cxxii–cxxv.

[435] Goldschmidt, pp. 157, n. 47, 166, 228.

[436] *Ib.*, pp. 122–123, n. 97.

[437] *Ib.*, pp. 127–128, n. 113.

Italian cities,[438] and after this date their number multiplies greatly. The surest proof both of this point and of another of which we shall speak in a moment is this, that in the Middle Ages the words "custom" and "statute" are used quite interchangeably.[439] The very word "statute" may mislead us considerably in the sense in which it was used, say six centuries ago, because many statutes then were just as much a compilation of existing customs as a modern statute may be a compilation of existing case law. And so, although when one examines a statute it may seem to be a new and sweeping code passed by a city or a gild, one is much more likely to find that it has been built up almost entirely upon a basis of custom and borrowed bodily from some other place.

"Custom is alike the ruling principle and the originating force of the Law Merchant";[440] it was custom which kept the law practical and which adapted it so readily to the needs of commerce when they changed, and when the older law expanded into newer forms it was custom which shaped the legal principles underlying negotiable paper and insurance, purchase in good faith and *nuda pacta*. It was custom, again, which so strongly opposed and persistently refused to recognize rules of Roman or canon law which were opposed to the true interests of commerce. In this connection it is interesting to note that in the south of France it became customary in the late XII Century to waive by explicit provisions many of the technical "exceptions" of the civil and canon laws (even of the "customary" law), as the collection of legal documents made by Professor Doublet shows.[441]

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[438] *Ib.*, p. 157, n. 47.

[439] *Ib.*, p. 126, n. 110.

[440] Mitchell, p. 12.

[441] Doublet, pp. 150, 181, 185, 206, 213, 217, 232, 239, 258, 263–264. Agreement of July, 1188, *penitus omni juri et rationi renunciet:* deed of sale, January 5, 1212, *abrenuncians exceptioni non numerate pecunie; et, si prefato pretio plus valeret, illud spontanea voluntate et donatione simplici vobis dono:* deed of sale, January 13, 1213, *renuncians juri pignoris pro dote sua et senatusconsulto Velleiano et legi Julie Romanorum:* agreement, January 28, 1219, *renunciamus ex certa scientia omnibus legibus et canonibus subvenientibus fidejussoribus minorum sive pupillorum . . . et nove constitutioni de duobus reis, et legi que dicit principalem debitorem esse prius conveniendum quam intercessorem, et generaliter omni juri legali et canonico et consuetudinario, competenti et competituro, promulgato et promulgando:* agreement, June 5, 1219, *renuntiamus omni exceptioni et omni juri scripto et non scripto:* deed of sale, December 19, 1221, *renuncians ex certa scientia exceptioni predicte pecunie non recepte et non numerate michi,* etc.: cession, July 24, 1227, *renuncians omni juri civili et ecclesiastico, confecto vel in futurum conficiendo:* deed of sale, August 30, 1237, *renuncians dilationi xx dierum et quatuor mensium*

In the development of the commercial law, custom is the decisive factor.[442] " 'Out of his own needs and his own views' the merchant of the Middle Ages created the Law Merchant." [443] When commerce was humble and small, comparatively few rules were necessary to govern it, but as it increased in extent and in complexity it must be obvious that the body of rules which governed it would grow in a similar way. The analogy here is perfect with that of the maritime law, as we saw it develop in the last chapter, and the analogy continues to the next step. With the multiplication of regulations arising out of custom some sort of codification becomes necessary in order to have the rules arranged in a proper and systematic form and also to prevent them from being forgotten. The oldest code of this sort of which we have a record appears to be the *Consuetudini antichi* of Genoa, of earlier than 1056,[444] though many more codes are met after the beginning of the XII Century [445] in Italy. It must be noted that it was in Italy that the customary law was first reduced to writing, just as many principles of commercial law were there created or developed.[446] As a natural result, the Italian commercial law tended to become less of a customary traditional law and to develop into a written law, although never to the exclusion of unwritten custom.[447] Because of this codification and of the wide-spread diffusion of the Italian merchants the law tended to become more uniform.

Finally, just as navigation had certain universal conditions and certain universal needs, as we have seen, so there were certain permanent and general needs of trade which worked for a general uniformity of custom. In this conclusion Mr. Mitchell agrees: [448] "The whole history of Law Merchant in Europe during the Middle

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et omni alii dilationi et exceptioni et juri quod contravenire posset: deed of sale, April 27, 1238, *renuncians ex certa scientia exceptioni peccunie non recepte et non numerate sibi, et exceptioni doli et infractioni et omni alii exceptioni . . . renuncians ex certa scientia ejus legis auxilio que dicit: "Si deceptio facta fuit ultra dimidiam justi precii* et cetera," *et legi que dicit quod donatio facta possit revocari, si facta fuit ultra quingentos aureos, et legi que dicit quod donatio facta possit ex causa ingratitudinis revocari . . . renuncians dilationi xx dierum et quatuor mensium, et omni alii dilationi, juri et exceptioni juris et facti.*

[442] Goldschmidt, p. 166.

[443] Mitchell, p. 161.

[444] Goldschmidt, pp. 156–157, n. 45; p. 151, n. 29.

[445] Ib., pp. 156–158, 167–168. Ashburner, pp. cxix–cxx.

[446] Mitchell, p. 34.

[447] *Ib.*, pp. 29–30.

[448] *Ib.*, p. 156.

Ages was characterised by a constant advance towards uniformity and by the successful assertion of new principles of law. It was developed in local courts, in which directly or indirectly the merchants declared the law. The international nature of trade even in mediæval times, the general similarity in economic conditions that gradually arose, and the predominant influence of the legal conceptions and the commercial usages of the Italian merchants, all combined to make the law administered by merchants to merchants more uniform and international in character." Part of the general uniformity of the early Italian codes upon so many points of law was due to the universality of commercial usages, and part was due to deliberate and extensive borrowing. The increasing competition undoubtedly led to comparison, and among the *consules hospites* each city numbered some of its most enterprising and most influential men who were familiar with the laws of other cities in a thoroughly practical way.[449] Legal concepts, no less than goods, were exchanged, and so with the beginning of the XIV Century we find laws and customs commencing to be freely exchanged,[450] a process altogether analogous to that which we have traced in our last chapter on the history of the contemporaneous maritime law, where we have seen the code of Oléron copied successively in Damme and in Wisby,[451] and where the Senate of Lübeck sent copies of its laws to the Order of Livonia.[452] This borrowing, which often degenerated into wholesale copying, went on not only in Italy during the XIV and XV Centuries but also all over Europe,[453] and had the fortunate result of bringing about a considerable amount of uniformity.[454]

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[449] Morel, p. 86.

[450] Mitchell, p. 33.

[451] Desjardins, pp. 74, 80–81.

[452] *Ib.*, p. 55.

[453] Mitchell, p. 33. Sometimes this was frankly acknowledged, as in the preamble to the *charte de coutumes* of Montferrand, which is certainly anterior to 1199 and which reads, "Au nom de Deu del Paire a del Filh a del Saint Esperit amen. En Guillaume le coms de Clarmont e sa maire lhi comptesse donneront la Ville de Monferrand a tots les homs et a tots les femmes qui maizo i penriont ni si auriont ni estarront en la vila de Monferrand bos usages e bona cosdumas la melhiors que hom poiria troba a obs de Borzes a Monpeiler a al Pois." Favyé, *Montferrand*, Paris, 1923, pp. 90–91.

[454] Morel, pp. 78–79. "Il restait, pour faciliter les relations de cité à cité, à unifier autant que possible les législations locales, de manière à ce que les marchands ne trouvassent pas une trop grande différence de traitement juridique, quand, au cours de leurs voyages, ils passaient d'un endroit à un autre. Cette unification fut surtout l'oeuvre des *emendatori* (on les appelle quelquefois *statutarii*)."

At first it was confined to an occasional provision, where there was some gap in the local law,[455] or to such matters of gild regulation as those concerning the destruction of badly manufactured products and the observation of rules of hygiene in the workshops.[456] But at this time there were appointed officials called *emendatori,* whose duty it was to keep abreast of the laws of other cities, and who were empowered to incorporate into the local law foreign provisions that seemed advantageous.[457] Their tenure of office was sometimes permanent and sometimes temporary. It was their duty to examine laws from the viewpoint of practical results, and to adopt the best by this standard. With the rise of new commercial transactions, such as insurance, and with the attempted enforcement by the Church of the canon laws, such as those against usury, the *emendatori* had a considerable scope for their labors. They worked nobly to achieve the unity of the law by the simple process of borrowing laws from one another [458] word for word,[459] taking whole chapters at a time [460] and copying them down to their very errors! [461] Frequently in Italy the little towns would borrow their laws wholesale from the big cities—Milan is an instance of such parentage [462]—but, allowing for some interplay, in the larger cities the statutes grew up more concurrently. In the other parts of Europe the commercial law's growth was usually characterized by a direct and complete borrowing by the smaller towns from the larger ones, and we find a further difference in that the laws owe more to the town custumals than to gild legislation,[463] of which we shall shortly speak. It is quite possible to establish a filiation [464] between the mother towns in each country, whose laws served as models for many of the lesser towns. Rouen and Beaumont in France; Lübeck, Frankfurt, Magdeburg, and Cologne in Germany; London, Oxford, and Bristol in England; Hereford for Wales, were all leading sources in their respective districts,[465] and the same method was also followed in Flanders and in Spain,[466] and, generally, all over the Continent.

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[455] Morel, pp. 76–77.

[456] *Ib.,* p. 77, n. 1.

[457] *Ib.,* p. 78.

[458] *Ib.,* p. 79.

[459] Lattes, p. 68, n 24. "Nella maggior parte dei casi non si tratta di sola analogia sostanziale di principii, ma anche di vera identitá di forma, essendo talora le parole stesse trascritte dagli uni negli altri."

[460] *Ib.,* p. 61 and notes 24–27. "Un fatto particolarmente notevole si osserva nella formazione degli statuti piú recenti delle cittá lombarde—Monza, Milano, Cremona, Brescia, Bergamo—l'identitá cioé di alcuni capitoli ripetuti e copiati letteralmente dall' una all' altra compilazione, e l' analogia di parecchi altri che presentano lievissime modificazioni; cosicché apparisce evidente che nel compilarli si esaminavano le migliori leggi della regione e s'imitavano liberamente, scegliendo forse quelle norme che alla prova dei fatti avessero dato un risultato piú utile al commercio. Tale imitazione si estendeva fino agli errori. . . . Probabilmente il punto di partenza di tale imitazione furono gli statuti di Milano, giá in quel tempo prevalente a tutta le cittá vicine. . . . Ad epoche fisse o variabili gli emendatori nominati compivano la revisione e riforma degli statuti; nell' intervallo i consoli de' mercanti, i consigli delle corporazioni, i principi emanavano leggi particolari per supplire alle urgenti necessitá giuridiche."

[461] Morel, p. 79. Lattes, p. 61.

[462] Lattes, p. 61.

In Germany the system was carried to its fullest development, and the courts of the daughter towns appealed to the mother town as a regular matter of legal procedure,[467] a matter of which we shall speak later. But Italy was always the most important home of the mediæval law. The Italian collections of law, such as the Pisan *Constitutum Usus,* to which we have already made a brief reference in the last chapter, are often long and elaborate. "For the 13th and 14th centuries there exist for almost every city of importance in Northern Italy collections of commercial statutes that give a full and detailed account of the commercial law that was observed within the city." [468] Little by little there was being formed in each city a special law exclusively applicable to commercial disputes, a law which became more important with the development of the gilds and of the consular courts.[469] The commercial law must also be sought for in gild statutes, for in many cities the gilds controlled the city government directly or indirectly. Nothing is more interesting than to follow the patient and continued efforts of the gilds on the one hand to introduce rules in harmony with the judicial rules which were derived from commerce and on the other hand to make a selection so as to preserve only the best among the rules, which finally became common to almost all the cities. The gilds were at first cautious and very reserved about changing the law. They did not touch the civil laws in force but only filled up the gaps and created additional customs. With the increase in the variety of businesses new forms of contracts appeared, while at the same time the Church strengthened its rules against usury. This made business so difficult that there was an energetic reaction against the civil legislation, and new corporate customs grew rapidly, not only supplementing the civil law but derogating from it whenever it was more harmful than useful to the activities of commerce.[470] When the gild statutes were confirmed by the municipal government they of course had the same authority as the municipal laws. The gild statutes were sometimes supplemented by commercial laws in the municipal statutes,[471] but where there were conflicts the gilds claimed the right to override the municipal law[472] and so the civil law was only of a secondary importance as a source for the commercial law.[473] And just as the authority of the gilds had become substantially universal, so the authority of their statutes achieved an equal extent.

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[463] Mitchell, p. 35.

[464] Gross, I, pp. 259–281.

[465] Mitchell, pp. 35–36. Gross, I, pp. 267–268, 270–271. Huvelin, pp. 243–244.

[466] Gross, I, pp. 268–270, 271.

[467] *Ib.*, I, pp. 271–281.

[468] Mitchell, p. 31. Lattes, pp. 8–22.

[469] Morel, pp. 77–78.

The limits placed upon their decrees were not great. In the first place they could override the civil law or the municipal law,[474] and they could explicitly forbid the use of the civil or the canon law[475] in their trials.[476] The conditions limiting the exercise of this power were not great. Straccha lays down a number of limitations in his *De Mercatura,* published in 1553, but they do not always seem to be convincing. He seems, instead, to be like some modern writer on International Law, writing about what the law ought to be, rather than what it is. For instance, he states that the merchants were not permitted to forbid the use of the regular courts and to compel the use of the gild courts before a consul,[477] a thing which the evidence shows us not to be true. The limitations which seem to us to have existed are as follows: a statute must not create a monopoly, unless it is approved of by the public; [478] it must not work plain injustice; [479] it must not be against the public law of the city,[480] nor against natural or divine law; [481] most especially it must relate to commercial matters.[482] "Subject to these conditions these powers were extensively used," [483] as we shall see when we examine the substantive law. But furthermore many of these regulations of the gilds were technical in character and were for the purpose of securing good workmanship, a reliable product, fair wages, healthy workshops, a reasonable price, etc.[484] Obedience to these statutes was strictly enforced, at first by a fine, and, ultimately, by expulsion.[485] The individual gild could not limit the collective legislative power of all the gilds as a group, but it could enlarge their power, as regarded itself,[486] a rule altogether analogous to that of the admiralty jurisdiction of the separate American States which can create new liens of a maritime nature to be enforced in the Federal jurisdiction.[487]

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[470] Morel, pp. 76–77.

[471] Mitchell, p. 31.

[472] Lattes, p. 75, n. 10.

[473] *Ib.,* p. 71, and notes 4 and 5. "Anche gli statuti civili debbono annoverarsi tra' fonti del diritti commerciale, ma la loro importanza fu affatto diversa secondo che appartenevano a cittá che non ebbero proprii statuti de' mercanti, od a quelle che ne posse dettero. In queste ultime essi contenevano bensi norme relative a negozii commerciali, ma valevano soltanto a supplire agli statuti de' mercanti, i quali derogavano talora espressamente a quelli e prevalevano nelle materie comuni."

[474] *Ib.,* p. 59. Morel, p. 78. The communal authorities even authorized a certain number of departures from the customary rules. Goldschmidt, p. 165. Straccha, pp. 248, 250. "Num statutum valeat, quod contra scripturas mercatorum non possit obiici exceptio præscriptionis, et probat valere, cum possint aliter, quam ius commune decreverit statuere." And see below, p. 189 n. 481.

[475] Both to avoid dilatory pleas, as regards procedure, and also to avoid the usury prohibition, in substantive law. For such a decree, see below, p. 246, n. 744.

[476] Lattes, p. 75, n. 10; p. 72. "Alcuni tra essi escludono esplicitamente in cause mercantili l'applicazione del diritto civile e canonico."

"The same general agreement upon the main rules and principles, with the same divergences upon less important points, characterize all the commercial codes and customs of Europe . . . In every commercial country in Europe there were rules and legal doctrines for merchants and mercantile transactions that were regarded alike by merchants and by jurists as distinct from the common law of the land. Each country, it may almost be said each town, had its own variety of Law Merchant, yet all were but varieties of the same species. Everywhere the leading principles and the most important rules were the same, or tended to become the same." [488]

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[477] Straccha, p. 251. "Vetantur, et illud statuere mercatores, quod nullus ex eis possit alium in ius vocare coram præside, sed tantum coram eorum consule."

[478] *Ib.*, p. 251. "Talia enim statuta monopolium inducunt, merito sunt improbata, nisi a publico approbentur."

[479] *Ib.*, p. 250. "Idem Bal. in relato loco ait, non posse aliquid decernere, quod naturaliter, et evidenter fit iniustum."

[480] *Ib.*, p. 250. "Item contra ius publicum totius civitatis statuere vetantur."

[481] *Ib.*, p. 248. "Item si dicta statuta communi iuri, seu municipali, quod civitas sibi constituisset, contradicerent, dummodo divinum ius, vel naturale non improbarent, servanda tamen inter eos sunt."

[482] *Ib.*, p. 248. "Sed hæc intelligenda sunt, ut statuere possint in his in quibus iurisdictionem habent, pertinentibusque ad mercaturam, et ipsos mercatores, non autem in his quæ remota sunt ab eorum officiis, et professione."

[483] Holdsworth, *H.E.L.*, V., p. 72.

[484] Morel, p. 77.

[485] Lattes, p. 60. "L'autoritá degli statuti de' mercanti era uguale a quella degli statuti civili, e l'esecuzione si assicurava con sanzioni pecuniarie, determinate dagli statuti in misura assai varia ed irregolare, o rimesse all' arbitrio dei consoli: estremo remedio, come si disse altrove, era la esclusione dalla corporazione."

[486] Goldschmidt, p. 166.

[487] Hughes on Admiralty, 2nd ed., pp. 29, 110–111.

PART III

A. THE JURISDICTION OF THE COMMERCIAL LAW COURTS

The jurisdiction of the courts developed slowly but steadily from a very limited competence to a much broader one. In the early days of the markets, as we have seen, the jurisdiction of the market courts was quite restricted. It extended to certain classes of commercial cases which arose within a restricted area, the area of the market.[489] Later on, as the peace of the market grew, the market became a place of asylum, and the market court had jurisdiction of criminal as well as of civil cases within that area. When the markets grew into towns, in the north of Europe, the jurisdiction of the courts also underwent a transition, and became quite mixed. The city courts had jurisdiction over all burghers and also non-burghers in certain classes of commercial cases.[490] In the Italian cities the earliest jurisdiction was that of the gild courts.[491] Their jurisdiction was only consensual and extended, at first, solely to members. It was, of course, confined to commercial and gild matters. But later the gild courts managed to extend their authority over everyone engaged in commerce and to make their jurisdiction compulsory. The test of jurisdiction over the defendant [492] was now the same as that in later France and in England until almost the end of the XVII Century: What was his status? Was he a merchant? But at last the sway of the law was extended to everyone, and the status of the litigant was no longer considered. The only test became the subject-matter of the litigation, and, if it was a commercial matter, the courts had jurisdiction.[493] At this point one beholds the true court of commerce for the first time, and the result was attained in France over a century and a half earlier than in England.[494] A jurisdiction formerly personal had become real.[495] It was not necessary that both parties should be merchants, in Italy, in order for the courts to have jurisdiction; it was sufficient that the defendant was engaged in business,[496] and, in the case of agents and factors, they could be called before the courts, even when they had ceased to be engaged in business, in order to be questioned about affairs transacted before their renunciation.[497] We must note, too, that the courts had become permanent and were no longer periodic. Finally, certain people were exempt from the local jurisdictions even at the end of this period—the foreigners, wherever they had formed themselves into companies and had been granted special privileges. In disputes among themselves they were quite generally free from the local jurisdiction, but when anyone other than a member of their own company was involved as a defendant the case seems to have come before the local courts. One final point: the Italian statutes provided for compulsory arbitration, sometimes in the first instance, and sometimes at the reference of the judge—this applied only to merchants, obviously.[498] This same compulsory arbitration was adopted in France [499] in 1560 and was not abolished until 1856.[500]

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[488] Mitchell, pp. 7–9.

[489] Above, pp. 132–133 ff.

[490] Above, pp. 173–174 ff.

[491] Above, p. 141.

[492] The status or nationality of the defendant appears to have been the determining factor in mediæval practice. Thus, in North Africa where there was an action between Christians of different nationalities it had to be brought in the consular court of the defendant; where the action was between a Christian and an Arab it also had to be brought in the defendant's court. Mas Latrie, *Relations*, p. 164. So, at Constantinople, Heyd, I, pp. 257, 464.

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[493] Lattes, p. 251. "La giurisdizione delle curie mercantili secondo gli statuti italiani non viene determinata dalla qualitá dei litiganti ma dalla natura delle controversie, cioé non forma un privilegio speciale pei mercanti né s'estende di regola a tutte le cause d'ogni specie che s'agitano tra essi, ma comprende soltanto quelle che si riferiscono a negozii commerciali."

[494] In France in 1563; in England hardly before the time of Lord Mansfield. It is the law in France today; *Code de Commerce,* Dalloz ed. (1924), Liv. IV, Tit. II. Art. 631. "Les tribunaux de commerce connâitront [des contestations] relatives aux actes de commerce entre toutes personnes."

[495] Morel, pp. 53, 212–213.

[496] Lattes, p. 251. "Inoltre secondo il maggior numero delle leggi, affinché i tribunali speciali possano esercitare la loro giurisdizione, non é necessario che entrambe le parti siano commercianti, ma basta che la persona convenuta in giudizio eserciti l'industria mercantile, qualunque sia l'attore."

[497] *Ib.,* p. 253. "La giurisdizione de' tribunali di commercio secondo gli statuti s'estende a tutti gli ausiliarii e commessi del mercante, continua dopo la cessazione del traffico anche per rinuncia volontaria, per tutti gli atti anteriori ad essa, e dura altresí contro gli eredi."

[498] *Ib.,* p. 244. "In alcuni statuti si legge sancito il principio dell' arbitrato obbligatorio, cioé si prescrive ai litiganti di rimettere le liti ad arbitri per via di compromesso, od almeno si dá facoltá ai giudici d'obbligarvi le parti; in altri é soltanto concessa licenza di seguire questa via amichevole componimento invece della giudiziale, sebbene i legislatori, pur mostrando chiaramente di preferirla, non credessero opportuno imporla in modo assoluto."

B. THE PROCEDURE OF THE COMMERCIAL LAW COURTS

In matters of procedure we owe much to the early Germanic rules [501] and also to the later rules introduced by the merchants. We also owe much to the canon law and to the great Decretal of Clement V of whom we shall soon speak. Certain phrases are used to characterize the procedure of the Law Merchant wherever we study it, and they are almost invariably the same, sometimes taken word for word from Clement's Decretal. Here again, as so often, we owe much to the Italian merchant's genius, for the procedure of the important French courts of commerce, which has been so influential in the European legal development, was founded on that of the Italian gild courts.[502] This procedure has certain essential characteristics wherever we behold it: (1) It is summary; (2) it is swiftly administered; (3) the decisions are based upon equity rather than upon the technicalities of the law; [503] and (4) lawyers are not permitted to appear or to plead. It is very probable that this rapid procedure originated in the need of the stranger for quick justice.[504] The stranger does not wish to delay for many days while the case hangs fire; he wishes to settle it and to be gone. In the previous chapter we have seen the desire of the mariner "to be gone with the first tide," and the merchant's desire was as strong and as reasonable as the mariner's.[505] But whether or not the etymology suggested for the English Piepowder Court is correct—that justice was rendered as swiftly as dust could fall from the feet—the definition illustrates the speedy type of procedure which the merchants thought necessary. This same principle was recognized in Champagne, where, in 1299, the Guards speak of the "bon droit et hastifs us des foires." [506] Now when mercantile cases came before the canon law courts they were specially tried under special warrants [507] calling for a certain type of procedure. But the canon law courts were courts having a certain amount of rigidity and yet needing to reconcile this to the usual demand of the merchant for swift and equitable justice, as called for by the Papal commissions to the courts. To settle the matter definitely, to give the courts a lead, and to explain a phrase usually employed in these commissions, Pope Clement V published his celebrated decretal, *Sæpe contingit,* in 1306.[508] For our purposes it is not necessary to translate here the decretal although we give it below in full. What it actually effects is to tell the judge what parts of the suit may be abridged, what stages in it may be omitted, and what must be retained. But we must note that the judge is to be able to proceed upon holidays, he is to cut off delays, to shorten the suit as much as possible by cutting off dilatory and vain exceptions and appeals, and by curbing the disputes of the lawyers and the needless number of witnesses. Nevertheless, he ought not to shorten the suit so that it cannot be properly proved and defended.

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[499] Morel, pp. 194–195.

[500] *Code de Commerce,* Dalloz edit. (1924), p. 15b.

[501] Huvelin, p. 191.

[502] Goldschmidt, p. 176.

[503] Morel, p. 58. "En ce qui concerne la procédure, deux tendances s'accusent nettement: il faut d'une part que tous les procès mercantiles soient tranchés dans des délais extrêmement restreints; il faut d'autre part ne point tenir un compte exagéré de la lettre des textes et se décider surtout d'après les faits de la cause." Mitchell, p. 12. "The summary nature of its jurisdiction is a second feature that always characterized the Lex Mercatoria. Its justice was prompt, its procedure summary, and often the time within which disputes must be finally settled was narrowly limited." Morel, p. 116. "Le triple caractère de simplicité, de rapidité et d'économie." *Ib.,* pp. 157, 200, 205, 214.

[504] Goldschmidt, pp. 120–121, n. 87. "Auch im Italienischen Gastgericht ist das Verfahren durchgehends prompt." In England at Ipswich, *Black Bk. of Adm.,* II, pp. 22–23, "The plees be twixe straunge folk that men clepeth pypoudrous, shuldene ben pleted from day to day." In France, Morel, pp. 94, 99–100, 116, 151.

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[505] Mitchell, p. 13.

[506] Goldschmidt, p. 230, n. 157. Huvelin, pp. 418–419. Morel, p. 205.

[507] The phrase "procedatur simpliciter et de plano et sine strepitu et figura iudicii" was in use in judical commissions *before* this Decretal of Clement V, as the rubric to it explains: "Determinat et declarat quid significent hæc verba, inserta in iudicialibus commissionibus quae fiunt a principe vel a iure s. qd. *procedatur simpliciter,*" etc. See the charter of 1301 cited in Huvelin, p. 384, n. 3, where trials are to be decided *summarie ac de plano . . . et matura iusticia sibi fiat,* also p. 418 for the courts of Champagne.

[508] *Constitutiones Clementinarum,* Lib. V, Tit. XI. "Sæpe contingit quod causas committimus et in earum aliquibus simpliciter ac de plano ac sine strepitu et figura iudicii procedi mandamus; de quorum significatione verborum a multis contenditur et qualiter procedi debeat dubitatur. Nos autem dubitationem huius modi quantum nobis est possibile decidere cupientes hac in perpetuum valitura constitutione sancimus: ut judex cui taliter causam committimus necessario libellum non exigat, lite non contestatione postulet, tempore etiam feriarum ob necessitates hominum indultarum a iure procedere valeat: ampulet dilationum materiam, litem quanto poterit, faciat breviorem, exceptiones appellationes et dilationes frustratorias repellendo, pertium advocatorum et procuratorum contentiones et iurgia testiumque superfluam multitudinem refrenando. Non sic tamen iudex litem abbreviet quin probatores necessariæ et defensiones legitimæ admittantur. Citationem vero ac praestationem iuramenti de calumnia vel malitia, sive de veritate dicenda, ne veritas occultetur per commissionem huius modi intelligimus non excludi."

This Decretal fixed the meaning of the phrase generally used in judicial commissions both as regards the Church and the cities,[509] and one finds that the gild statutes conform in this respect to the civil law.[510] The phrase becomes exceedingly common, and it would not be difficult to compile a long list of statutes in which it is found.[511] The phrase, in fact, passes into the law and becomes of common use, whether in Latin or in a colloquial tongue; its principle was followed in the Admiralties of England[512] and France and by the German Hansa.[513]

In the second place, the courts had not sat at all frequently before the date of the Decretal,[514] once or twice a week or even less frequently, and never on holidays, but now, as a result of the decretal and of many city statutes, they sat much more frequently and even on holidays, excepting only those of the greatest religious importance.[515] The fair courts of Champagne, for instance, sat three times a day,[516] and the French Admiralty held a daily court from one hour to another.[517] This was also true in England, as we shall shortly see, and generally in France.[518]

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[509] Morel, pp. 60, 76.

[510] Lattes, p. 259. "Regola fondamentale comune a tutti gli statuti é che nelle cause mercantili la procedura dev' esser condotta colla maggior possibile brevitá; oltre alle molte disposizioni che tendono ad accelerare la risoluzione delle controversie con opportune modificazioni del processo ordinario, il principio, che le cause commerciali devono trattarsi in forma sommaria, viene espresso direttamente e chiaramente in tutti gli statuti de' mercanti e confermato dalle leggi civili. In parecchi testi s'incontra pura la formola solenne *quod procedatur sine strepitu et figura iudicii,* il cui senso, per lungo tempo affatto incerto e controverso, fu precisamente determinato nella celebre Decretale Clementina *Sæpe,* promulgata nel 1306 dal pontefice Clemente V."

[511] *Ib.,* p. 268, n. 4. This provision is to be found in the cited statutes of the following cities: Padua, Pavia, Monza, Cremona, Milan, Brescia, Bergamo, Genoa, Radicondoli, Florence, Lucca, Fermo, Bologna, Pesaro, and Rome. Huvelin, p. 418, in Champagne in 1370. Goldschmidt, p. 173. Morel, pp. 107–108. Schaube, pp. 239, 249, France and Spain.

[512] *Black Bk. of Adm.,* I, p. 409. The appointed deputy of the Admiral, acting as judge, must "make summary and hasty process from tide to tide, and from hour to hour, according to the law marine and ancient customs of the sea, without observing the solemnity of the law."

[513] Mitchell, p. 15.

[514] *Ib.,* p. 12. For instance, two weeks in Rouen in the XII Century; Rouen's customs were received in many French cities. In Florence in 1302, forty days. In Pisa, in the XII Century, eight days; in 1305 three days. In Mantua in 1400, one month; in Como in 1286, fifteen working days if the party was a merchant, otherwise two months.

[515] Morel, pp. 60–61. Huvelin, pp. 420–421 and notes.

[516] Goldschmidt, p. 230, n. 157.

The third principle, which gave origin to much discussion, was that by which the courts of commerce were to proceed according to equity and to examine the truth of the fact itself, without regard to the formal legal rules of evidence and proof.[519] There is nothing more characteristic of the mediæval law of commerce than its spirit of equity,[520] its desire for true justice, and its abhorrence of legal technicalities. To express this we again find certain phrases that are commonly used, or their equivalents: *ex aequo et bono, sola veritate rei inspecta, sola facti veritate inspecta,* etc.[521] This principle of substantial equity runs all through the *lex mercatoria* in every place and at every period. To give but a few examples, such a provision was in force in Bologna in 1250,[522] and soon after in many Italian cities;[523] it was adopted in Spain in the XIV Century;[524] and in the XV Century the English Admiralty expressly acknowledged the principle of equity.[525] In 1457 Bergamo copied almost the exact words of Bartolus, which Baldus[526] and Straccha follow: "in the disputes of merchants equity is especially to be considered and the cases ought to be decided honestly and equitably and it is most improper to dispute about the technicalities of the law."[527] This also was law in France [528] and we see it laid down in the statutes of Marseilles in the XVI Century that the judges are to decide suits without considering the technicalities of the law.[529] "Plain justice and good faith, disregard of technicalities and regard for 'the sole truth of the matter,' characterize alike in England, France and Italy, the development of the Law Merchant." [530]

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[517] *Black Bk. of Adm.,* I, p. 450, ordonnance of 1373 of the French Admiralty, "Sera tenue la jurisdicion dudit admiral . . . pour les marchans forains de iour en jour et d'heure en autre."

[518] Morel, p. 157.

[519] Lattes, pp. 259–260. And see above, p. 162, n. 263.

[520] Mitchell, p. 16.

[521] Goldschmidt, p. 173. Morel, p. 58.

[522] Huvelin, p. 419, n. 4. "Quod ius fori et mercati reddatur secundum consuetudinem fori sive mercati, non servata sollempnitate statutorum communis Bononiæ."

[523] Goldschmidt, p. 173, n. 105, citing the statutes of Bologna, Zara, Pisa, Piacenza, Lucca, Brescia, Verona, Florence, and the Genoese colony of Pera.

[524] *Ib.,* p. 174, n. 105.

[525] *Black Bk. of Adm.,* I, p. 409. The lieutenant general of the High Admiral "ought to make summary and hasty process from tide to tide, and from hour to hour, according to the law marine and ancient customs of the sea, without observing the solemnity of the law, and without mixing law civil with law maritime there where it may be equitable, knowing the right of the parties."

[526] Goldschmidt, p. 174, n. 106. The Bergamo statute runs, "in causis mercatorum æquitatem precipue spectandam et ex æquo et bono causas dirimendas esse et de apicibus iuris disputare minime congruere."

[527] Straccha gives the same rule at p. 244. "In curia mercatorum æquitatem præcipue spectandam et ex bono et æquo causas dirimendas esse et de apicibus juris disputare minime congruere." Also above, p. 154.

Finally, we come to the matter of the employment of counsel. The intervention of lawyers before the civil tribunals gave rise to discussions and to chicaneries as sterile as interminable,[531] which involved, naturally, the loss of time and of money. In order to avoid this abuse the right of representation was strictly limited. In a general way it was forbidden [532] to parties to confide the defence of their interests either to advocates [533] or to officers of a gild who were cognizant with the matter. Foreigners, the poor, those who had reasons for not appearing which were declared to be adequate, and people not competent, as minors and females, solely enjoyed the right of being represented by anyone. Some statutes gave the magistrate the right to compel the pleaders to appear in person; but mostly they permitted the sending of a representative who ought to belong to the same gild or at least be a near relative.[534] "The lawyers it was thought should be employed to settle points of law, and not argue matters of fact, and to put a good face on a bad case. The danger of such a set of rules is of course that each case will be decided on its own facts according to the individual views of the judges, and that no legal principles will be evolved." [535] But the mediæval Italian merchants solved the difficulty rather well since they recognized that they might be ignorant of the most elementary principles of law, even though skilled in the usages of commerce.[536] Three different means were adopted to enlighten this ignorance: sometimes the statutes required that jurisconsults should agree in the decisions of the merchants, sometimes a jurist was attached to the consular college,[537] perhaps as president,[538] and, finally, it was sometimes arranged that a jurisconsult should give the consuls opinions whenever they desired it, but that they were not necessarily to be bound by it.[539] In France the judges were customarily merchants; in Germany they were sometimes merchants and sometimes jurists.[540]

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[528] Huvelin, pp. 419–420.

[529] Edict of Charles IX, 1565; Morel, p. 136. "Pour juger et decider sommairement tous procès et différends entre marchands, sans s'atteindre aux subtilités des lois et ordonnances."

[530] Mitchell, p. 20.

[531] Technicalities and quibbles promptly invaded the fair court of St. Ives in England, at the end of the XIII Century, as soon as the lawyers were admitted. Maitland, *Select Pleas in Manorial Courts,* pp. 135–136. "We are now in a court where professional pleaders were employed. From the manorial courts efforts were made to exclude them; the lord did not want them there. . . . But the court of a fair could not be so domestic a tribunal; the lawyers invaded it. We must add that the rather sudden demand for professional pleaders seems to have engendered a great deal of corruption and chicane; there is much evidence that the lawyers of Edward I's day, great and small, judges, pleaders and attornies, had no very high standard of professional honour."

[532] Morel, pp. 157–158, 205. Goldschmidt, p. 171.

[533] Just as in the Courts of Commerce in modern France it is, in general, forbidden to employ lawyers. *Code de Commerce* (1924), Liv. IV, Tit. I, Art. 627. Also the *French Code of Civil Procedure,* Art. 414. This was a principle taken over from the earlier Germanic law, Morel, p. 116, also p. 158, "Nul n'est ois par procureur."

[534] Morel, pp. 62–63.

C. QUALIFICATIONS AND ELECTION OF THE CONSULS

From the XIV Century, in general, the merchants themselves elected the judges who composed the consular tribunal.[541] Sometimes the election was direct [542] and sometimes it was by two steps, in which, occasionally, chance played a considerable part. All the members of the gild who were engaged in commerce and who had reached the age of twenty-five or thirty years were eligible; the parents of the retiring consuls were ineligible, as were the latter until after a certain lapse of time; and also those who had failed in their duties to the gild or who were disqualified by special statutes. Some statutes permitted the consuls designate to refuse to serve; others forbade it.[543] This elective principle existed practically from the beginning in Italy, and triumphed, after some difficulty, in France and in Germany.[544] It was never adopted in England.

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[535] Holdsworth, *H.E.L.*, V., p. 84.

[536] Morel, p. 58.

[537] Goldschmidt, p. 170.

[538] Lattes, p. 249, n. 10.

[539] Morel, pp. 57, 68–69.

[540] *Ib.*, p. 212.

[541] *Ib.*, p. 54.

[542] Such is the method in France today. *Code de Commerce*, Dalloz ed. (1924), Liv. IV, Tit. I, pp. 314–319.

[543] Lattes, p. 37. "L'assemblea generale de' mercanti nominava i consoli nel tempo stabilito, o per elezione diretta, o, come si usava spesso ne' nostri comuni, per elezione a doppio grado; cioé il consiglio sceglieva alcune persone, in numero limitato, vario secondo le cittá, a cui si affidava poi l'elezione dei consoli; queste persone, (designate pur esse o con votazione regolare o col noto sistema *ad brevia*), dovevano esser cittadini e membri della corporazione, in etá sufficiente da poter dare un maturo giudizio; né potevano eleggere sé medesimi o i loro parenti. Non di rado indicavano un numero di nomi maggiore di quello

D. APPEALS

The right of appeal varied considerably in the different cities. We have seen that Pope Clement's Decretal classes appeals with exceptions and useless delays, which the judge is to refuse. The cities in general were inclined to forbid appeals or to narrow the grounds on which they could be demanded,[545] for fear of lengthening disputes or of denying to the foreign merchants the swift justice that was necessary for them.[546] Certain statutes distinguish in the allowance of appeals according to the subject-matter of the dispute, or of the persons concerned, or of the amount in issue.[547] Thus the *Breve curiæ maris* of Pisa permitted appeals in general, but denied them when the dispute concerned ship's average or freight, or seamen suing for their wages.[548] In general one must appeal within three to five days of the rendering of the decision. Sometimes the appeal lay to the original judges to reconsider their sentences, but more often it lay to a new court of appeal.[549] We have seen how the gild courts were judged by the heads of the gilds, the consuls, sometimes assisted by special judges. Above the consuls was the court of appeal, the super consuls, also chosen from the gilds, while in the cities where the gild courts were not supreme, special courts were provided by the statutes. If,

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degli eligendi, tra cui decideva la sorte od il voto dell' assemblea. Ai consoli designati alcuni statuti permettevano, altri vietavano la rinuncia. Erano eleggibili soltanto i membri della corporazione che esercitavano il commercio ed aveano raggiunto un determinato limite d'etá, 25 o 30 anni; esclusi i parenti dei consoli e chi mancasse a' suoi doversi verso la corporazione; alcuni statuti ammettevano particolari divieti riguardo alla religione, al buon nome, al partito politico: i consoli uscenti non potevano rieleggersi se non dopo un certo lasso di tempo."

[544] Morel, p. 212.

[545] Goldschmidt, p. 175. "Die Appellation ist vielfach ausgeschlossen oder eingeschränkt." Morel, p. 72, n. 1, citing statutes of Pavia, Piacenza, Florence, Cremona, Milan, and Bergamo. *Ib.*, p. 214.

[546] Morel, p. 72.

[547] *Ib.*, p. 72, n. 2, citing statutes of Pavia, Verona, Pesaro, Bologna; also *ib.*, pp. 136–137.

[548] *Ib.*, p. 72; Chs. 11 and 12 of the statutes.

[549] *Ib.*, p. 73.

on appeal, a decision was sustained by the court of appeal, the matter was irrevocably ended,[550] but if, on the contrary, the decision was reversed, it was usually necessary for the case to continue to a court of third instance, whose judges were restricted to affirming one of the two conflicting decisions in the lower courts.[551] The execution of the sentence originally pronounced was not usually suspended because of an appeal,[552] and it was swiftly and rigorously enforced, especially in the courts of Champagne.[553]

PART IV

We now come to consider the final part of this chapter—certain special topics, chiefly doctrines of the Italian commercial law. In the content and in the development of these laws we can perceive four influences at work: the old Germanic law, as in the requirement of the personal appearance of the pleaders before the judge and in the earlier rule that stolen property could be recovered from the possessor, however good his faith at the time of acquisition; the Roman law; the Canon law; and, fourthly, the customs of the merchants, modifying, developing, and creating the law as their own needs required it. The influence of the Germanic law was not great, but that of the Roman law was distinctly greater than that of the Canon law.[554] In a number of Italian cities[555] the merchants' statutes expressly declared that the Roman law was to be followed whenever the statutes themselves were silent upon a point.[556] Just as we find the Roman law responsible for certain legal principles in the sister field of the maritime law,[557] for instance, the doctrine of general average, and certain fundamental principles of the contracts of affreightment and of bottomry, so too do we find that the Roman law was the general basis of commercial contracts, and, consequently, of much of commercial law.[558] In the theory of obligations the Roman law was not greatly modified in later times, and most of these modifications were taken from the Law Merchant, itself founded on Roman law.[559] The Canon law, as we have just seen, made its contribution by the field of quick and equitable procedure, and it was governed by the same fundamental principle of equity when it aided mercantile custom and supported good faith by declaring that the simple word of an honest man ought to be sufficient consideration to support a contract.[560] This element of good faith was very strong in the Canon law.[561] On the other hand, the Canon law helped to confine and to hinder the development of the commercial law, and there even was a section of Church opinion which held that the merchant, in the narrowest meaning of the word—one who distributes and sells, as distinguished from one who produces by manufacture—was almost as much to be condemned as a usurer![562] But while this extreme view was never officially adopted by the Church it was always held that money ought not to be productive of gain,[563] and so certain of the new legal doctrines had to develop in a concealed fashion, as we shall see when we examine the law of insurance. On the other hand, the Church's prohibition was not enforced as rigidly as has sometimes been supposed,[564] and it served a useful purpose in keeping the rates of interest low.[565] But many of the provisions of the law were really directed toward the regulation and standardization of commerce.[566] No less than the Church the State based its laws upon compulsion and control,[567] rather than on liberty, and it is the development of commercial law according to its own needs and according to its own views that is of such importance for our purpose.[568] When we come to examine these specific rules of the law we must remember that although they were *almost* universal they were not *quite* so, and therefore we must repeat the excellent words of warning written by Mr. Mitchell:[569]

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[550] Morel, p. 74.

[551] Lastig, p. 265. Morel, pp. 162–163. Goldschmidt, p. 175. Lattes, pp. 266, 243. "In tutte le cittá ch' ebbero proprie corporazioni de' mercanti, le funzioni giudiziarie per le cause commerciali furono sempre esercitate in prima istanza da' capi di quelle, talvolta in modo esclusivo, altre volte insieme con altri giudici, a cui gli statuti attribuiscono la stessa autoritá; questa giurisdizione non solo é sancita dalle leggi mercantili e trae quindi, com' esse, orizine dalla volontaria delegazione dei commercianti, ma viene anche confermata nelle leggi civili. Pei giudizii in appello si costituisce nelle corporazioni una magistratura speciale permanente col nome di sopraconsoli, o si eleggono di volta in volta i giudici per lo piú mediante estrazione a sorte; talora queste cause vengono rimesse ai giudici ordinarii. Alcuni statuti designano anche i tribunali, ai quali si ricorre in terza istanza, quando la sentenza d'appello non sia conforme a quella di primo grado. Invece nelle cittá, ove non si formarono le corporazioni de' mercanti, la decisione delle cause commerciali si affida ai magistrati ordinarii, od a curie speciali elette ne' modi determinati dagli statuti civili."

[552] Huvelin, pp. 425–426.

[553] Morel, pp. 159, 162. Huvelin, pp. 426 *et seqq.*

[554] See above, p. 127.

[555] Como, Piacenza, Cremona, Bologna, Florence, Pera (Genoa).

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[556] Lattes, pp. 72 and 76, n. 11.

[557] Carter, *Eng. Legal Institutions,* p. 263.

[558] Mitchell, p. 160.

[559] Lattes, p. 122. "Nella teoria delle obligazioni le leggi romane, avendo conservato un' autoritá molto maggiore che in ogni altra parte del diritto, furono applicate, trascritte, imitate dappertutto, cosé da formare tuttora il substrato dei codici moderni colle poche modificazioni imposte dai tempi nuovi."

[560] *Ib.,* p. 123. "Le consuetudini mercantili, non meno delle leggi canoniche, giovarono poi a stabilire la regola che i patti debbono mantenersi inviolati, bastando la parola d' onest' uomo a costituire la causa legale delle obligazioni ed il dovere giuridico d'eseguirle rigorosamente, senza bisogno di formalitá solenni ed essenziali . . . legge imposto ai guidici l'obbligo di sentenziare secondo equitá e buona fede, ed ai mercanti é pure prescritto di mantenere in buona fede i contratti e le promesse reciproche."

[561] Goldschmidt, p. 141.

[562] *Ib.,* pp. 138–139, n. 160. Following St. John Chrysostom, "homo mercator vix aut nunquam potest Deo placere—ideo nullus Christianus esse debet mercator, aut si voluerit esse, projiciatur de ecclesia Dei: quod difficile est inter ementem et vendentem non esse peccatum: Quicunque rem comparat, non ut ipsam rem integram et immutatam vendat, sed ut materia sibi sit aliquid operandi, ille non est negotiator; qui autem comparat rem, ut illam ipsam integram et immutatam dando (vendendo) lucretur, ille est mercator, qui de templo Dei ejicitur.—Unde super omnes mercatores plus maledictus est usurarius."

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[563] Goldschmidt, p. 138.

[564] *Ib.*, pp. 140–141. "Ungegründet ist die in mannigfachen Wendungen wiederhalte Behauptung, dasz das neue Handelsrecht nur sehr allmählich die Fessel der kirchlichen Satzung abgestreift, ja bis auf die neuere und neueste Zeit sich unter deren wesentlichem Einflusz gestaltet habe—es wird verwechselt die gelehrte juristische wie theologische Doktrin mit dem wirklich geltenden, wenngleich nicht ohne Mühe sich durchkämpfenden Verkehrsrecht des späteren Mittelalters; es läszt sich von diesem Standpunkt und bei Beschränkung auf die Zeugnisse dieser Doktrin nicht die Geschichte des Verkehrsrechts aufbauen, sondern nur eine Darstellung desselben im Lichte der theologische-juristischen Doktrin (der "Wucherlehre") geben. Nicht einmal das Zinsverbot hat die Kirche praktisch durchzuführen vermocht, und nur so viel ist richtig, dasz ohne dasselbe einzelne, aber nicht erst durch dieses Verbot hervorgerufene Verkehrsinstitute, wie z. B. Rentenkauf, Bankcommenda, Seeassecuranz, einen geringeren Aufschwung genommen haben würden." Mitchell, p. 159. "On the whole the doctrines and principles of the Canon law told in favour of the Law Merchant. On several important principles [the principle of representation; equity; good faith; the binding force of a simple promise; summary methods of procedure] the two systems of law were in substantial and permanent agreement, while the prohibition of usury by the Church was not difficult to evade and, as opportunities for the employment of capital increased with the general expansion of trade, that prohibition was gradually relaxed."

[565] Goldschmidt, p. 140, n. 165.

[566] *Ib.*, pp. 141–142.

[567] And see above, p. 135.

[568] Goldschmidt, p. 142. *"Es beruht so nicht nur das geistliche sondern kaum minder das weltliche Verkehrsrecht des Mittelalters nicht auf Freiheit, sondern auf Zwang und Kontrole, freilich nicht nach kirchlichen Gesichtspunkten kirchlicher Obern, sondern nach Anschauung der Berufs—und Standesgenossen. In der Gestaltung seines Rechts aus eigensten Bedürfnissen und Anschauungen heraus liegt die Grösze und für alle Zeit vorbildliche Bedeutung des Mittelalterlichen Kaufmannsstandes."*

[569] Mitchell, pp. 113–114.

"But though the Law Merchant was thus a separate system of law, distinct from the common law, distinct from individual town customs, it was by means of the central authority that the law was sometimes altered or authoritatively declared; and while it cannot be asserted that a commercial usage of any individual town, however great or however important that town might be, formed a part of the Law Merchant, the usages of the great commercial cities tended to conform to the general usage of merchants throughout Europe. The Law Merchant of mediæval times was the system of rules actually enforced in the commercial courts and actually observed by merchants in their dealings with one another, just as Modern International law is the system of rules actually observed by modern States in the relations of State to State. The treaties, the legislation, and the actions of individual States do not necessarily conform to the generally recognized rules of International Law, but they may be and are used as evidence to establish what those rules really are. In the same way the Statute Law of mediæval states, the ordinances of mediæval kings, and the usages of mediæval law, need not conform, in any particular case, to the commercial regulations generally enforced among mediæval merchants, but they may be used to establish the general usages of merchants in commercial cases."

AGENCY AND POWERS OF ATTORNEY

Agents and factors of a merchant were also subject to the commercial courts, under Italian law, whether their disputes were among themselves or against their principal.[570] In a number of the Italian cities they were liable for the principal's debts, and they could also conclude contracts binding on him, so that in mercantile usage "factor" and "socius" had about the same significance.[571] As late as the time of Edward I the English common law of agency was undeveloped. But the English Law Merchant of the XIII Century accepted the principle that if an agent bought goods title vested in the principal at once. This was law as early as 1291.[572] Under the Bristol Law Merchant a merchant was responsible for transactions entered into by his agents,[573] or for goods and money delivered to them, and delivery to an agent was good delivery to the principal. This was based upon the principle of credit given as the result of

[570] Mitchell, p. 83.

[571] Goldschmidt, p. 250 and n. 51.

[572] Mitchell's App. IV.

[573] Following the Italian rule: Lattes, p. 103 and notes 11 and 14. "In generale gli ausiliarii . . . rispondevano col principale verso i suoi creditori ed in caso de fallimento erano compresi nel bando a lui inflitto . . . Reciprocamente questi era obbligato verso i terzi per gli atti compiuti dagli ausiliarii." Goldschmidt, p. 249.

well-known and customary agency.[574] In Italy it was customary for the young merchant to go abroad for a time as a factor, in order to learn the principles of his business, returning home later when he had travelled and was experienced.[575] Bills of exchange were usually paid and received by agents.[576]

The power of attorney is met as early as 1156,[577] and also a clause absolving the agent from liability for losses provided he acts in good faith.[578] When a power of attorney was revoked, especially as regarded an agent abroad, it was frequently registered with the gild.[579]

BROKERS

During the Middle Ages the brokers attained to a very important position on the Continent. Usually limited in number, required to be of good character and repute, they were appointed and sworn in by the municipal magistrates or by the gilds. Their existence was often in the interests of the local monopoly, whenever it was required that strangers should arrange their sales through them. In some cities it was forbidden to everyone to contract directly and it was required to contract through the brokers, contracts otherwise made not being binding. Some of the brokers specialized in a single form of business, and, as we shall shortly see, had a considerable influence upon the early development of insurance. They were legally competent to make valuations, and hence were used to establish losses by breach of contract and by the defects of goods; later, also, they established the course of exchange. Their fees were legally established by tariffs and they had their own gilds. They were required to keep written records of all the transactions in which they had acted, and, as their records and testimony were given a special sanctity, they acquired the position of quasi-officials. Because of this status the brokers were forbidden to transact business which the State forbade, such as usury, or in spoiled or unlawful goods. In order to preserve impartiality neither a merchant nor a merchant's partner could be a broker, and a broker had to declare to the parties concerned any personal interest that he might have in a transaction.[580]

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[574] Mitchell, pp. 83–84.

[575] Goldschmidt, p. 249, n. 48a.

[576] *Ib.*, p. 428. Huvelin, p. 553.

[577] Goldschmidt, p. 249, n. 47. In Genoa, "Ego wilielmus scarsaria facio te girardum nepotem meum nuncium ad reciperanda et accipienda ea que mihi debet wilielmus alfachinus et do tibi potestatem accipiendi ea et ut quicquid inde feceris firmum sit et stabile tanquam ego hoc facerem et quod ipsum inde possis absolvere sicut egomet."

[578] *Ib.*, p. 249, n. 47. "Do tibi licentiam accipiendi bicancios quos ultra mare accipere debeo et inde facias bona fide quicquid videbitur et inde ab omni dampno te absolvo quicquid inde contigerit."

[579] *Ib.*, p. 249.

SALES—PURCHASE IN MARKET OVERT

Both the Roman and Germanic law, as regards sales, were unsatisfactory to the mediæval merchants, for neither gave to their bargains the security and certainty that they wanted for their commercial interests. At first in the markets and then in the fairs the new rules and customs arose, two of the main points being the power of earnest money to bind a bargain, and the validity as against the owner of a purchase in good faith in market overt of goods lost or stolen. The Roman law entitled the owner to claim possession, no matter whose the hands or what the circumstances of purchase.[581] Under the Germanic law the same right existed, but it was modified by the theory of possession; the article could be recovered provided only that it had not been stolen from a servant, agent, or bailee having lawful possession derived from the owner, in which case the latter's remedy lay against the servant, following which the servant's remedy lay against the thief, just like the Roman law. In the Frankish period and at the beginning of the Middle Ages we have seen that the market was the only place where it was permitted to traffic, and that a sale outside the market was the equivalent of smuggling, from which it followed that outside purchases were irregular and suspicious and that the presumptions were against them, while a purchase within the market prevented an accusation of theft, operated as a guarantee,[582] and made it impossible to bring an action against the purchaser. Next, perhaps under the influence of the Roman law, it began to be thought that the purchaser lacked true *dominium* over the goods, although he was protected as a purchaser in the open market, for which reason the true owner had to restore the price paid, irrespective of good faith or of bad faith. When the periodic commerce had become permanent there was a further development, since transactions outside of the market became legitimate. Sales made in the market-place at any time became legitimate, as well as those made in places where business was customarily transacted. The newer idea that purchases must be made in good faith also gained ground, but, because of the exigencies of commerce, certain presumptions were established, for instance, purchase under normal conditions and in the proper places gave rise to the presumption of good faith.[583] In practice, also, the usage grew up that if a sale in good faith could be proved from the previous owner, it was sufficient. And so we see that by the XIV Century this principle of repayment of the purchase price, or even that purchase in market overt gave good title to stolen goods, was of great strength in Italy, France, and Germany. During the Middle Ages the general rule was that it was only *bona fide* purchase in fairs or in markets that gave title to stolen goods, though in the Netherlands the *bona fide* purchaser was protected in any case. Other than this, in France and in Germany, the old Germanic law was followed. The next development was to extend the privilege from the fair or market-place to all the places where business was transacted, and this became the general custom and is today part of the law of Austria, Germany, Italy, and France. In another provision the mediæval law went well beyond the modern law,[584] for it permitted an unpaid vendor who had sold goods on credit to recover them in case of the bankruptcy of the buyer, provided that they were still in the latter's possession.[585]

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[580] Authorities for this section: Goldschmidt, pp. 250–254; Mitchell, pp. 91–92; Huvelin, pp. 529–533.

[581] Huvelin, p. 456, n. 1. "Ubi rem meam invenio, ibi vindico."

[582] *Ib.*, p. 459. "On exprime ce fait, au moyen âge, en disant que le marché lui-même est garant."

In England the rule of the Anglo-Saxons was in accord with that of the other Teutonic tribes, and the owner had to reimburse the purchaser in a market the sum which had been paid.[586] Later on both Britton and Bracton seem to have reintroduced the Roman rule, by which the owner's property was restored to him without his having to pay what the possessor had given for it,[587] although the possessor was protected from a charge of theft by proving purchase in an open market.[588] The English merchants, like the others, desired to be protected in their ownership of goods that might have been stolen which they had bought at fairs or at markets, but in the XIII Century the royal courts did not admit this doctrine, for "Stolen goods can be recovered by legal action, not only from the hands of the thief, but from the hands of the third, the fourth, the twentieth possessor, even though those hands are clean and there has been a purchase in open market." [589] On the other hand, a case which was decided at the fair court of St. Ives in 1291 [590] seems to show that at that time the principle of *bona fide* purchase (in this case, *nec habuit ipsum extraneum suspectum de aliquo latrocinio)* was beginning to be recognized and accepted, at least by the Law Merchant. This latter rule was finally adopted by the law and in England the privilege of market overt was extended to purchases made in open shops in certain towns, especially in London, to be proved as a matter of custom,[591] and through this the presumption of good faith [592] and regularity grew up.[593]

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[583] Goldschmidt, p. 299, n. 3. The statutes of Nice provided: "Quicumque rem aliquam emerit *publice* et bona fide, non teneatur eum reposcenti domino reddere, nisi pretium quod in ea dederit restituat emptori." Similar provisions are to be found in the statutes of Avignon, Perpignan, Vienne, Toulouse, and Geneva. Huvelin, p. 462, n. 1. Also Goldschmidt, pp. 299–300. "Gegen das römische Vindikationssystem gilt reines oder modifizirtes germanisches Recht vorwiegend in Frankreich, vereinzelt für den Handelsverkehr, obwohl in wachsendem Masze auch in Italien: das auf offenem Markt oder sonst offentlich erkaufte, desgleichen das über See gekommene Handelsgut kann nicht oder doch nur gegen Lösung entwehrt werden; das in dem Schutze redlichen Erwerbs noch weiter gehende Judenrecht wird auf Wechsler, Pfandleiher, Leihäuser ausgedehnt."

[584] Sale of Goods Act, 1893, Art. 39.

[585] Goldschmidt, pp. 300–301.

[586] Huvelin, pp. 460–461, n. 3.

CONTRACTS

The idea of good faith, as borrowed from the Church, was to have a still wider influence, and it was coupled with the principles of the *æquitas mercatoria,* which found intolerable the detrimental subtleties of the Civil law as well as many of the hindering restrictions of the Canon law. What the merchants always wanted and eventually obtained was, besides a swift court procedure before experienced judges of commerce, an elastic and yet a strong law to govern their credit relationships. Business was done in the Middle Ages chiefly upon a basis of credit, rather than by barter or for cash, and it came to have very great and important ramifications of an international nature; for instance, when Edward III repudiated his debts to the Florentine bankers in 1339 he not only caused their bankruptcies but also a lasting depression of commerce in their part of the world.[594] It has been well observed that "Credit, not distrust, is the basis of commercial dealings. . . . The object of mercantile usages is to prevent the risk of insolvency, not of fraud." [595] But in the Middle Ages it was also necessary to guard against a fraudulent advantage being taken of the technicalities of the law, and in this respect good use was made of the Church's doctrines of good faith, in an attack upon the law's formal conception of contracts. Both the Roman and the Germanic laws did not consider a simple promise, devoid of legal form (*nudum pactum*), to be binding.[596] In fact, as a general proposition, consensual contracts were unknown to the Germanic law.[597] Against this point of view the Church urged, and the Canon law supported the proposition, that a man was bound by his simple word, and that God drew no distinction between this and an oath,[598] while commercial usage held that among merchants whose business existed from day to day by contracting there could be no doubt of earnestness and of the intention to contract. Into the civil law this principle passed very slowly and with difficulty. It was not accepted in France until the XV Century, and the older principle prevailed in Germany until the end of the Middle Ages. But as in the question of purchase in good faith, so the principle of good faith in contracts found an earlier acceptance within the Law Merchant.[599] Bartolus and Baldus recognized in Italy in the XIV Century that informal contracts were valid in commercial matters,[600] as a special usage, upon principles of equity. Verbal promises were not, however, the usual case, for, as early as the XIII Century, it was customary to have commercial documents drawn up by the notaries,[601] and frequently they were registered with designated public officials in order to give the documents a greater authority. Now since the notaries steadily drew up documents they tended, just as lawyers do today, to use phrases whose meaning was thoroughly understood and commonly accepted, to follow precedents, and hence to crystallize them into stereotyped forms. Beginning with the XIII Century regular form books were drawn up,[602] and the uniform legal phraseology of the *stylus mercatorum* became almost universal in southern Europe, and by its uniformity did much to establish commercial customs. While the contracts themselves may have been interpreted according to the rules of the Roman law the merchants included new provisions and excluded old interpretations in order to make the contract conform to their ideas of what was needful. Beside the oral contract, but governed by the same principle of Canon law, one also meets with abstracts of contracts, which were equally enforceable, even though not reduced to the form of an instrument by a notary. Nor, as long as the contract was evidenced by writing, was it necessary for the document to state the cause of the obligation. This is especially met with in connection with actions to recover a debt, in which only the debtor's receipt was produced.[603] "It is perhaps impossible to say that in early mediæval times all the trading countries of Western Europe had gone as far as the great commercial cities of Italy in refusing to recognize the necessity of stating the cause of contracts, but for later times the opinion of Lord Mansfield, that the purely English doctrine of 'consideration' did not apply to commercial contracts is interesting." [604] One must also note that most of the completed documents contained a renunciation of the various exceptions to its validity permitted by the civil law. In cases of joint obligation it was usual to permit by stipulation a joint creditor to sue and a joint debtor to be sued severally. There were, also, paid guarantors, chiefly bankers. The direct substitution of a third person, either to perform the contract or to receive the benefit of performance, is known, generally in the field of bills of exchange. The conventional penalty is *in duplum*. If payment is delayed, interest is paid, or the creditor may sometimes borrow the sum due, to be at the expense of the tardy debtor. Those who offer their services to the public, especially officially established tradesmen, are under a legal duty to contract with the public. Shares and demand loans were trafficked in at market quotations. Contracts made within the fairs of Champagne were swiftly enforced, especially so if they were drawn up by a notary and sealed with the seal of the fair, which gave them special privileges. In such a case, as we have seen, the documents had executory force in many places, and the only possible plea was that of forgery. From the XII Century onward all obligations contracted in the fairs of Champagne carried with them a privileged mortgage on the property of the debtor, by which debts contracted at the fairs ranked prior to all outside debts, though on an equal basis as regarded one another. The general tendency was to give the creditor full

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[587] *Ib.*, p. 460, n. 3, citing Bracton, ed. Sir Travers Twiss, II, p. 516, "Sed nihil restituetur ei de precio, quod solvit pro eadem re." Britton, Lib. I, Ch. XVI, No. 5, "le chalengé (the possessor) voist quite, et perd ces qe il avera done pur la chose."

[588] Huvelin, p. 458, n. 2, giving the same citations of Bracton and Britton.

[589] Pollock and Maitland, *Hist. of Eng. Law,* II, pp. 164–165.

[590] Mitchell's App. V.

[591] *The Case of Market-overt* (1596), 5 Co. Rep. 83b.

[592] *Sanders* v. *McLean,* 11 Q. B. D., 343.

[593] The authorities for this section are Huvelin, pp. 455–466; Goldschmidt, pp. 299–301; Mitchell, pp. 93–102 (not always accurate).

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[594] Goldschmidt, p. 304.

[595] Bowen, C. J., in *Sanders* v. *McLean,* 11 Q. B. D. 343.

[596] Goldschmidt, p. 305.

[597] Pollock and Maitland, *Hist. of Eng. Law,* II, p. 185.

[598] *Ib.,* II, p. 195, citing Hostiensis, ad tit. *de pactis.* § *quid sit effectus:* "quia inter simplicem loquelam et iuramentum non facit Deus differantiam."

[599] Lattes, p. 123. Mitchell, p. 105. "It is quite clear that in the 14th century the validity of nuda pacta in commercial transactions was recognised in Italy by mercantile usage, and it seems probable that in commercial and local courts they were recognised in England."

[600] Lattes, p. 129, n. 2.

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[601] Brooke, *The Office and Practice of a Notary in England* (1901), Ch. I. Goldschmidt, pp. 171, 151–152 and notes. Lattes, p. 282. Mitchell, pp. 108–110. Huvelin, p. 474. The notaries were originally scriveners who used shorthand, or "*notæ.*" They were officers of a court, and had to be appointed by a count or by the pope or the emperor, and documents drawn up by them were *instrumenta publica confecta,* when registered in a court. In the course of the XII and XIII Centuries such documents also gained executive force and could be enforced like judgments of a court. Hence, almost all the important mediæval documents were drawn up by them. They were learned in the law and were also charged with the editing of city and gild statutes; they were secretaries of the city courts and of the gild courts; and were found abroad at the side of the consuls. In the middle of the XIII Century there were 200 of them in Genoa; in 1292 there were 231 in Pisa; at the end of the century there were 400 to 500 in Milan; and in the XIV Century there were about 600 in Florence. A notary kept regular books in which minutes of all the transactions were made, for, as we shall see when we examine the law of insurance, they were not reduced to a formal shape unless a lawsuit impended, since it was often the rule that one could not sue in a city or gild court except on instruments drawn up by a notary. When a notary died his books were either handed over to his successor or deposited among the public records. The books of a Genoese notary for the years 1155–1164 contain the notes for about 1,000 documents; those of a notary of Marseilles for 1247–1248 contain notes for 1,031 acts of commerce. The notary never took a position of much importance in England.

[602] Goldschmidt, p. 152, n. 32. *Summa artis notariæ.* Irnerius had drawn up a *formularium.*

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[603] Goldschmidt, pp. 306–307, n. 36. A statute of Piacenza, 1323, declares "Consules mercadanciæ teneantur et debeant facere et reddere racionem cuiconque persone de quolibet scripto facto et scripto de manu alicujus mercatoris qui dicat: ego talis debeo tibi tantam pecuniam, sicut facerent et redderent de instrumentis publici notarii." At Milan, 1347, "Quilibet debitor vel fideiussor ex causa negociacionis seu mercadancie vel gestionis alicujus negociacionis, vel pro cambiis vel depositis vel recommendacionibus factis alicui mercatori seu penes eum vel aliqua occaxione ex predictis orta vel secuta, dum constet de debitore per cartam vel condempnacionem vel per scripturam manu debitoris stantem, vel aliqua earum, eciam si causa debiti non sit aposita in illa scriptura, vel alio modo appareat debitor seu constet de debito, termino solvendi debitum ellapso teneatur et debeat solvere creditori—in pecunia numerata—."

[604] Mitchell, pp. 105–106.

security for the debt, and so, on the Continent, movables ceased to be the sole security and real property became liable also. Where there was more than one debtor it eventually became customary to make each liable for the entire debt—"chascun por le tout," and, similarly, when there were several sureties.[605]

PARTNERSHIP AND PRIMITIVE CORPORATIONS

In Chapter II we have already referred to the maritime aspect of certain mediæval relations of partnership,[606] which, like the general law that we are considering, bore a double aspect, at once maritime and commercial. We shall refer to them here but briefly since they had little influence on the English law, although they are the basis of the corporation law of the Continent. In the earlier part of the Middle Ages the *commenda* was the most common form of partnership, one where a sleeping partner furnished money or goods as capital, but did not conduct the business, while the other partner supplied a small amount of property or money, or none at all, but conducted the business. It was essentially a credit business and it was connected on one side with the early maritime loans, and on the other, with a primitive insurance in the assumption of risk on the transport of money, in which may be traced the earliest exchange. Most often the partner who furnished the capital took the risk, and the profits were divided on a 75 to 25 per cent basis, whereas if each partner furnished capital the profits were divided equally. The sleeping partner was liable only to the extent of the capital that he had put in. If both parties made material contributions this relationship was called a *societas* or *collegantia*. The capital might be definitely earmarked for trading in certain goods, or it might be left quite free. The duration of the partnership was sometimes indefinite and sometimes for a fixed time. At the same time there existed a larger and closer partnership called *compagna* or *societas* where all were supposed to be equally active and were equally liable for the company's debts, while one member could bind the firm, which was an advance upon both Roman and Teutonic law.[607] Many or all the partners' names would not appear in the firm name and so partnership was determined as including those who commonly traded together, those who frequently speculated together, those who were carried as partners on the firm's books, and even those who were partners by general reputation. A valid dissolution of partnership could be made only by public instrument. In the XIV Century gilds and cities began to register partnerships[608] in specially kept books, and it was necessary for a partner to register his withdrawal in order to avoid liability for debts subsequently contracted by the firm. The company itself was thought of as a separate entity and separate books were kept as regards its property, in which purchases and sales were entered, and which were periodically balanced. The capital which was contributed to the society by its members was subject to the purposes of the society, and no member had the right to dispose of any of the property of the society for his personal purposes. Frequently the members were not only forbidden to engage in similar businesses either for their own account or for that of others, but also to be partners in any other company of the same kind. The managing partners were compelled to account under very heavy penalties. It has been mentioned that a partner could bind the firm by contract.[609] Originally this right did not exist and the partners had to give each other the right by procuration to bind the firm. Failing this procuration the firm was originally not liable unless the debt was found entered in their books or unless the property had been employed for their common purposes. As a matter of course and of general usage the partner received power to bind the firm, so that at first it came to be taken as a matter of course and finally it was legally established on a customary basis in Italy at the close of the XVI Century. In the fairs of Champagne this principle was recognized much earlier, under certain conditions, as a "notorious custom." It may be that the fairs of Champagne gave the lead to the law in another respect. Originally it was only the property of the company that was liable for the company's debts and the individual partner had no personal liability.[610] This was the general law in Italy, and in France until

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[605] Authorities for the section: Goldschmidt, pp. 303–311, and notes; Huvelin, pp. 472–483; Mitchell, pp. 102–108, 119–120.

[606] Above, pp. 103–105.

[607] Goldschmidt, pp. 273–276. "Zu keiner zeit begegnet in der Praxis (mitunter wohl in der Theorie) romanischen Handelsrechts ein Zweifel und

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der Statthaftigkeit des Kontrahirens für und wider die übrigen (mit Namen oder unter der abkürzenden Formel genannten) *socii* mag der Kontrahent *Socius* oder Faktor der Societät sein: die (direkte) Stellvertretung ist hier, gegen römisches wie älteres germanisches Recht, voll anerkannt."

[608] Lattes, pp. 161–162 and notes.

[609] Above, pp. 164–165.

[610] Goldschmidt, pp. 283–284. "Selbstverständlich haftet für die gültige Gesellschaftsschuld das Gesellschaftsgut und insoweit jeder Gesellschafter *in solidum*. Dagegen dasz darüber hinaus die Socien auch mit ihrer Person und

the XVI Century. We have already seen that the fairs of Champagne maintained a system of reprisals with respect to debts contracted there, and, probably as the development of this system, it was already held, at the end of the XIII Century, that a partner had an unlimited liability for the debts of the company contracted there.[611] It was the law by custom in Genoa,[612] but, according to Goldschmidt, it was not a logical development from the idea of the company but rather an idea taken over from Germano-Lombard sources of law as the result of a confusion of ideas with the primitive family commercial groups.[613] There was also a third type of partnership—the joint-stock company, or stock corporation—in the process of formation during the Middle Ages. Its capital was composed of shares of stock, usually of 100 lire each, and the stockholders' liability was limited to the amount of capital represented by the share. The shares were freely alienable and inheritable, and they were registered in books specially kept for that purpose. These companies were governed by an administrative body of stockholders who owned a certain minimum of stock, and the body was elected by a majority. At first these companies were represented chiefly by the great companies formed for colonial exploitation in Italy in and after the XIV Century, and in England, France, and Holland in the following centuries. The Italian cities had begun in the XII Century to raise public loans which were divided into shares of 100 lire and were registered in books kept for that purpose. These shares were freely alienable and inheritable; they were free from judicial arrest; and were tax exempt. At various times these loans were funded, and the Bank of St. George was established at Genoa in 1407 in order to fund all the state loans into one, the

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ihrem Sondergut, somit nicht nur solidarisch, sondern auch unbeschränkt haften, versteht sich keineswegs von selbst, ist sogar für Italien nicht allgemein nachweisbar und mag zwar in einzelnen, insbesondere longobardischen Gegenden Italiens aus ursprünglich allgemeiner Güter- und Schulden-Gemeinschaft der primitiven Familienwirthschaft im Interesse des Handelsverkehrs herübergenommen sein, im Uebrigen aber in der allgemeinen Uebung der Ausbedingung solidarischer Haftung, vielleicht auch in dem insoweit aufrechterhaltenen Repressaliensystem wurzeln."

[611] Huvelin, p. 484.

[612] Goldschmidt, p. 284, n. 158. "Secus vero quod ad extraneos creditores cum dicta societate contrahentes, qui procul obligatum et hoc procedit potius ex consuetudine mercatoria quam de iure: usu enim in civitate Genuæ receptum est, quod socii expendentes nomen insimul tenenter contrahentibus secum in solidum."

[613] The word *company* is derived from *cum panis;* Goldschmidt, p. 272, n. 131.

security given eventually leading to the company's governing and administering the revenues of most of the Genoese dominions. The bank was the successor of earlier companies formed since the XII Century, on similar principles, by subscribers to earlier loans in order to safeguard their interests. These earlier companies were usually granted more restricted but similar privileges. In 1346 a private loan was raised in Genoa to provide funds for the conquest of the islands of Chios and of Phocæa, and the company thus formed, being successful, was given the *dominium utile* over the conquests by the Genoese state. In 1373 a similar company was formed concerning the island of Cyprus. There was no statutory or customary law generally applicable to these companies, for they were governed by their own individual statutes. The only original reason for their formation seems to have been to evade the Canon law prohibiting the taking of interest [613a]; taxes, revenues, or commercial monopolies were given to them, out of which they paid themselves dividends representing the interest on the loan which was the original cause of the transaction.[614]

TRADEMARKS

In the exact modern meaning of the word the trademark was not known in the Middle Ages, but we meet with substantially the same thing [615] and the law was governed by modern principles. Originally used to sign documents, the trademark came to have a much more general use in industry and for goods. Generally its fundamental form was based on the cross, but it seems also to have an affinity to the ingenious logographs of antiquity. A merchant's mark was legally protected against usurpation and against imitation; it was recognized as an asset that was freely alienable and that was convertible into money. It was entered beside the merchant's name in the register of his gild, but later a separate register of marks was kept. It was not a legal proof of ownership, but among the jurists it gave rise to such a presumption, which was, however, very difficult to prove in practice.[616]

[613a] That very similar motives operate today is shown by the decision in *Jenkins* v. *Moyse,* 254 N. Y. 319.

[614] Authorities for this section: Goldschmidt, pp. 254–298; Huvelin, pp. 484–485; Mitchell, pp. 124–139.

[615] For instance, the well-known dolphin and anchor on all the books from the Aldine press.

[616] Authority for this section: Goldschmidt, p. 242. The earliest English case to mention trademarks is *Southern* v. *How* (1591), Cro. Jac. 471.

MERCANTILE BOOKKEEPING

All the Italian statutes contain more or less complete provisions relating to commercial bookkeeping. Books were admitted in proof both in the courts of commerce and in the civil courts as long as they had been kept in the regular and customary fashion and were not suspected of fraud.[617] For instance, they showed who were partners in a firm, and proved that the contract of an agent was recognized as a joint debt from the fact that it, or the property that it represented, was entered in the books of the company. This latter was recognized by statute as early as 1301. In the reform of procedure which followed Pope Clement's Decretal of 1306 entries in commercial books were now and then even received as evidence of debt, and were given an executive force, almost like a notary's documents. Bookkeeping as such goes back to the days of the Greeks and perhaps earlier, but it was greatly facilitated by the introduction of Arabic numerals in 1202, and was brought to a highly developed system. A careful record was kept of all assets, as well as of the usual entries of debts and credits, and the books were periodically balanced. Double entry bookkeeping was known in the XIV Century and perhaps earlier. We have just mentioned[618] how carefully the early companies kept their books.[619]

BILLS OF LADING AND WAREHOUSE RECEIPTS AS NEGOTIABLE INSTRUMENTS

These commercial documents are already met with in the XIII Century,[620] but they are only receipts and have not yet become true negotiable instruments, although there is a suggestion of this in one bill of lading.[621] We have dealt with the warehouse receipt at some length in the previous chapter,[622] and have shown that it had not yet become negotiable, since when a debtor wished to give goods in a warehouse to his creditor as a security for a loan it was necessary to obtain a declaration from the manager of the warehouse that he now held the goods for the creditor, proving that title could not have passed by the mere endorsement of the receipt.[623]

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[617] Lattes, p. 283.

[618] Above, pp. 211–212.

[619] Authorities for this section: Goldschmidt, pp. 98–99, 174, 245–248, 277, 278, 280, 281, 383–384; Lattes, pp. 283 *et seqq.*, 294 *et seqq.* Article by David Murray in *The Journal of Comparative Legislation,* 3rd ser., Vol. V, p. 63.

[620] Bill of Lading at sea of 1337, Goldschmidt, p. 332, n. 113. "Pro furnimento galee armande ecce mittimus per Johannem Rubeum sancti Marcialis de Veneciis, latorem presentis, supra inscriptam viandam (meat, bread, cheese)—quam si ab eo receperitis, nobis rescribere debeatis, cui Johanni de suo naulo fuit integre satisfactum." On land, of 1248, *ib.*, p. 332, n. 114. "Ego Rainerius de Monteclaro, vettuarius, confiteor et recognosco tibi Willelmino Garceto de Asto me habuisse et recepisse a te 5 caricas zinzinbris et 1 balam de camelotis et 6 filaciatas, causa portandi predicta ad nundinas de Bari proxime venturas, precio seu loquerio IV l. et 10 s. vianensium pro singulis caricis; quod loquerium confiteor me a te habuisse et recepisse, renuncians etc.; quas etc. promicto tibi per stipulacionem bene et fideliter portare, tenere et custodire et eas tibi reddere apud Bar, infra nundinas cordoani, obligans etc."

NEGOTIABLE INSTRUMENTS

In the Middle Ages we find three sorts of documentary authentication of commercial rights. The first is the entry in books of commerce, gild and city and company registers, and the like, of which we have already spoken above in various places. In the second category are documents used solely as a means of proof of an existing right, such as the earliest conception of the warehouse receipt, and also many notarial documents, which, in consequence of their origin, generally had executive force, especially since they usually contained clauses waiving all the exceptions common at the time. Finally, there are the negotiable instruments. Now while most of our modern negotiable paper traces back to the earliest Middle Ages, many of the legal doctrines with which we are familiar today had not then been developed, or elaborated, and are no older than the XVII or XVIII Centuries. These documents are more than documents of proof, for they have a separate property value, but the rights which are attached to the document cannot be exercised or transferred without possession of it. It seems hardly necessary to say that the development and separation of this separate property value of the document, as distinguished from its probative force, is a long, slow process of growth in which there are many steps of transition, and during which the persons concerned had no clear knowledge of whither their steps were tending.

Originally these documents seem to go back to the late Roman and Lombard times, and their creation rests upon two acts, the drawing up and the delivery to the payee. The right created can only be enforced or transferred in connection with the possession of the document, or, as the phrase once was, the document was the bearer of the law, from which it followed that payment must also be evidenced by the return or cancellation of the document. The loss or destruction of the document naturally involved the loss of the rights which it represented. One meets, also, what one might have supposed to be a modern principle, that an oral agreement cannot vary a written one, and the tenor of the document solely governs: he who is indebted *ex scriptura* is indebted only *secundum scripturam.*[624] It was not necessary to state the cause of the obligation, and attack on this ground and on the general grounds of the other exceptions admitted by the civil law was suppressed. Such were the provisions that enabled the mediæval law of negotiable paper to develop far beyond that of antiquity and to fulfil needs that were unknown earlier, that enabled it to continue its development into our modern credit, in which without physical movement of place, goods and their money equivalent (in the shape of negotiable paper) circulate equally and at the same time.

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[621] *Ib.*, p. 332, n. 114, "dare et reddere tibi vel cui mandaveris."

[622] Above, pp. 123–124.

[623] Authority for this section: Goldschmidt, pp. 303, 332–334.

Negotiable instruments were payable in three ways, to order, to bearer, and in blank. The third was seldom met with in our period, though it was often met with in Italy in and after the XVI Century, and it has a certain analogy to the policies of insurance in which the name of the insured was allowed to lie open under such phrases as *nomine exclarando* or *pro se et persona exclarando*. These three types of negotiable paper can be traced back to the IX and even to the VI [625] Centuries, and there are also certain peculiar variants, which do not concern us, such as the "order-bearer" clause. In the XII and XIII Centuries the order clause was regularly found in the typical documents, but as yet the idea does not seem to have been fully grasped that each successive taker succeeds to the rights of the payee. In order paper the designation of the later taker was not indicated by the paper itself, but could be made in any legal way, such as by a power of attorney or by cession or by delegation. The first method was the customary fashion and prepared the way for the later distinction between personal and procuratory endorsements, although endorsement upon the document itself does not seem to have come in before the second half of the XVI Century. Originally a single negotitation exhausted the "order," for the person to be named had been named, but here, too, we may see custom at work, and the clause was construed to permit of an unlimited successive negotation, until finally the clause was taken for granted on certain documents, though these latter developments once again fall somewhat outside of our period. The possessor of paper carrying the bearer clause was in a more favored position, for he was legally entitled to collect the claim without further evidence. It is probably for this reason that it was not so often used, and that the civil law set itself so stiffly against this legal principle of the merchants.

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[624] Goldschmidt, p. 389, n. 22, citing Baldus, I, cons. no. 348. "Stabiles et firmæ debent esse scripturæ mercatorum—juxta illud vulgare dictum 'quod scripsi scripsi,' quia scriptura mercatorum et campsorum habetur, pro sententia et sua fide transit in rem iudicatam."

[625] *Ib.*, p. 135, n. 145.

One meets in a narrower extent than today with the legal idea that it is possible for one to contract with an unknown offeree, and we can see this as early as the XII Century in the use of general letters of credit by princes, popes, and other rulers, addressed generally to merchants and to bankers and drawn up for the benefit of their own servants. The drawer agrees to obligate himself to any person who loans money to the persons named in the letter of credit, and often it is not necessary to name the purpose for which the money is loaned. One may also regard these as strongly worded powers of attorney to make loans, with an agreement by the principal to be bound up to a sum named. They are to be found in England as early as the time of King John and are sometimes addressed *omnibus mercatoribus ad quos præsentes literæ pervenerint.*

One meets, also, with what Goldschmidt calls the *passive* order clause in order to distinguish it from the ordinary order clause which he calls the *active* order clause. The latter, which permitted payment to be made *to* a third person in place of the payee,—*tibi vel tuo certo nuntio, mandato; cui mandaveris, ordinaveris*—is quite common, as we have just seen. The passive order clause permitted payment to be made *by* a third person, in place of the drawer—*per me vel per meum nuncium, missum*—who might be definitely or indefinitely described. This passive order clause was quite superfluous from the point of view of the Roman law, since payment even by an unauthorized third person would have freed the debtor, but it was very important from the strict point of view of the very literal and binding phrase of the document, because payment by another was not payment by the debtor. This clause made such a payment acceptable and even pledged the creditor, if need be, to seek payment from the third. But that was as far as the creditor's obligation went. If the debtor's agent gave a draft or a check that was not honored the creditor could still claim his remedy against the original debtor, and he was not cut off from his remedy against the one by accepting the obligation of the other. These clauses were most used in transfers of money to a distance, for where payment was to take place in the place of delivery the names of both drawer and payee were usually specified. For the distant transfer, commerce held fast to the formal law of the active and passive order clauses, and to the Roman legal foundations of the law of substitution, cession, delegation, payment, etc., which were permeated, in the Latin countries, by the other Roman legal principles which the needs of commerce had modified. This was especially true in the case of the most important of all the means of transfer of money to a distance, the bill of exchange. Exchange, in the sense of the mediæval Roman law, was a contractual remittance, the sending of a sum of money from one place to another place. It took its technical name (from the exchange of currencies) quite naturally, because in the Middle Ages two different places would usually have different currencies. This exchange could always be of two sorts, a real movement of money or only a theoretical one, as the result of a clearance, but both represented the same thing in the civilian theory of the law—*venditio pecuniæ absentis pro pecunia præsenti.* The essential idea of the mediæval exchange is this difference between the place of receipt of the money and the place of payment; the remittance of money without a change of place is not "exchange" in the sense of the mediæval law, and was forbidden by the Church, which tolerated the former type of exchange. Exchange was valid if made orally, but it was almost always made in writing, the bill of exchange, which, by the beginning of the XIII Century, was known all over the South and the West of Europe through the Italian merchants, and was common in the fairs of Champagne. The matter was chiefly in the hands of experienced bankers, both because they were in a position to estimate most accurately the differences of monetary exchange and also because of their wide commercial connections they could assure the most favorable, most certain, and least expensive remittances. It was not so much used in international finance as it was used to answer to the needs of commerce in the remittance of money, and it was because of this latter need that it developed into so important and so general a credit business.

Its roots go back into classical antiquity and its typical documentary form is to be found even then, but we cannot trace it again until the middle of the XII Century. Its growth was further aided by the removal of the Papal seat from Rome to Avignon, for the papal collectors employed the services of the Italian banking houses in making their remittances. Finally, the great fairs aided the development of the bill of exchange, in the sums of money brought there and sent thence, in the payments made for goods sold there, and in the general habit of making payments there. These payments were especially concentrated in the fairs of Champagne from the XII Century onwards, and so great was their importance that Goldschmidt calls the fairs of Champagne the home of the exchange of all Europe.[626] Of the general situation in Champagne we have already spoken above [627] and we will not repeat it here. It is enough to say that simple clearing operations took place through the medium of bankers and that, from the beginning of the XIII Century, there existed this system of delegation of debts to the bankers, permitting the extinction of debts by means of this discount, but it was not generally used except after the XV Century.

The origin of exchange seems to be in maritime commerce, from which it later separated itself in order to continue its development upon the land. Not only do we find the oldest known bills of exchange dealing with maritime commerce, but also their earliest form is borrowed from that of the maritime loan, so much so that in the Italian legal phraseology exchange is spoken of as *cambio trajettitio "terrestre,"* and this relationship seems to have first been pointed out by Goldschmidt. It was possible to send money abroad in two ways: at the risk of the receiver, from which there developed the maritime loan; or at the risk of the sender, from which there developed the bill of exchange. The maritime loan, which was the great speculative business of the Middle Ages, frequently was less a matter of borrowing money than of remitting it. If one wished to send a sum of money overseas, directly, or in goods to be sold, or to pay a debt, or as a loan, or for speculation, one bore the risk and could see to the matter one's self, or one could have a carrier or an agent transport the goods or the money for one, in which latter case it was advantageous to loan it to a speculator, to be repaid at the destination, together with a high rate of interest. For the borrower it had the advantage of being the equivalent of insurance against the perils of sea, and, while the lender ran this risk, he had the chance of a considerable profit

[626] Goldschmidt, p. 226. "Die Champagner Meszplätze [sind] gleichsam Europäische Wechseldomizile."

[627] Above, pp. 168–169.

and was relieved from the trouble and expense of transport. If, on the other hand, the remitter did not care to run this risk, he could make an ordinary loan repayable at the destination, regardless of the danger, and this was usually done with a banker, whose business connections frequently enabled him to make payments without transporting the money itself. This is the early exchange. Except in regard to the assumption of the risk and the adjustment in the payment made thereby, the two relationships are quite alike. In both, the receiver of the money promises to pay it out overseas in the money there current (which was generally different from the currency of the place of origin); in both, the active and the passive order clauses are usual and also the renunciation of the usual exceptions of the civil law. This single difference in regard to the incidence of the risk is the typical one, for all the documents which concern maritime loans have the phrase "at the risk of the sea"—*ad risicum maris*—or "conditional upon safe arrival"—*sana eunte navi*—whereas, on the contrary, all the documents of exchange demand an unconditional payment and bear the phrase *salvum in terra* as early as the X Century. This whole system of the remittance of funds was taken over from maritime commerce just as it stood, and the system was utilized on the land, especially in regard to commerce destined for the fairs.

The earliest form of the bill of exchange in the Middle Ages was neither the draft, nor a promissory draft, but the promissory bill of exchange, in which the drawer promises for himself to pay a named sum at a distant place. In this typical form these documents can be studied from the middle of the XII Century. There follows the earliest known, from Genoa, made June 8, 1156.

> "Nos amigonus de curia, raimundus et ribaldus fratres accepimus a te ribaldo boleto libras CXV de quibus promittimus dare tibi vel tuo certo nuncio per nos vel nostrum missum perperos CCCCLX iusti ponderis ad mensem unum postquam pervenerimus ad curiam imperatoris constantinopolitani vel ibi ubi tenebitur curia ejus aut ubi dabuntur ejus soldate galeis. et pro persona tua si nobiscum veneris ordine predictorum dabimus tibi perperos XL, ita quod non tenearis esse nobiscum postquam ad curiam erimus. si vero non iverimus ad curiam imperatoris vel si non habuerimus soldatas dabimus tibi vel tuo certo misso omnes illos perperos usque ad proximum festum omnium sanctorum per nos vel nostrum missum. et si tunc non solverimus tibi ut superius legitur, usque proximiores kalendas augusti dabimus inde tibi solidos X pro uno quoque perpero sine periculo. quod si minime fecerimus penam dupli tibi stipulanti promittimus quisque pro parte sua."

And then follows a clause of guarantee and the executive clause. A shorter form with a bearer clause is found in the following Genoese document of April 6, 1207:

> "Simon Rubeus bancherius fatetur habuisse L. 34 denariorum Januae et danarios 32 pro quibus Wmus [William] bancherius eius frater debet dare in Palermo marcas octo boni argenti illi qui ei dabit hanc cartam."

In the documents which Blancard found in Marseilles there were not less than sixty-nine of these promissory bills to be found for the year 1248 in one notary's book, and here one first meets the later customary phrase *ex causa permutacionis seu cambii.* By 1250 there are notaries' books giving customary forms, and the documents we have always bear the active order clause and usually the passive clause also, are payable in a place other than the place of origin, generally in a different currency, and they mostly have the clause above.

For the purpose of making payments abroad it was also necessary to send a money order in the form of a letter to the person abroad who was to pay the payee in the name of, and for the account of, the drawer, designating the payee and naming the sum due, since otherwise the drawer's agent would not know that he was expected to pay and would have nothing by which to go. Now it must be obvious that this document could not have originally been negotiable and that it could have conferred no legal rights on the payee. The drawer had made no promise to pay on this document if it were dishonored; his promise was to be found on the bill of exchange. And this was the rule of both Roman and mediæval Roman law, that the drawer was not liable to the payee on such an order. Such a liability could not even be implied from the order, according to the fundamental Germanic and the older mediæval law. The order was not a true draft; it only regulated the relationship between the drawer and his agent, and it in no way concerned the payee or his assignee. The fact that one of these latter was mentioned was solely for the purpose of identification, and could not be construed to be a promise of indemnity if the order were dishonored. Still less did the draft develop out of the entries which bankers made in their books in regard to money payments made abroad, for the entry in the book of the order could not have had a greater effect than the order itself, in giving a legal remedy. Instead, one has to distinguish between the original draft, which was only an order accompanying a bill of exchange and was without legal force itself, as regards the payee, and the later type of draft which is a true separate and independent negotiable instrument. This earlier draft-order was the means generally used by a drawer to make payments in a foreign place, if he could not make them personally, and he gave it to the payee or to the payee's assignee, to present to his deputy for making the payment. It must be noted that this order was given in *fulfillment* of the promise made in the bill of exchange, to effect a payment, and that it was in no way a *separate* promise. It was not an instrument in appearance, like the bill of exchange, but an ordinary letter, and was not usually authenticated by a notary. There were generally four parties to such a transaction, especially with respect to those payable at the fairs: the drawer and his deputy, usually a banker, and the payee and his assignee, also usually a banker. These early order-drafts can be traced back as far as the middle of the XIII Century. The oldest that we have dates from 1272 and was made in Montpellier by a merchant and sent to his partner in Bologna. It reads as follows:

> "Noveritis me recepisse a tali dante nomine A. scholaris Bonon. residentis C libr. tur. quas promisi per me et meos socios vel societatem meam reddere Bononiæ præfato scholari: vel tot libr. bonon. quæ tantundem valent, habita cambii ratione."

In 1339 we find the form of draft which has been usual since that time. The draft is in the shape of a letter, signed and sealed with a mark. It is addressed to *Bartalo e compagni in Pisa* and close by are a merchant's mark and the word *Prima*. It was drawn in Avignon on October 5, 1339, and runs:

> "Al nome di Dio amen. Bartalo e compagni Barna da Lucha e compagni salute. Di Vignone. Pagherete per questa lettera a dì XX di novembre CCCXXXVIIII a Landuccio Busdraghi e compagni da Lucha fiorini 312¾ d' oro per cambio di fiorini 300 d'oro, che questo dì della fatta n'avemo da Tancredi Bonagiunta e compangni a raxione di IIII e quarto per C alloro vantaggio; e ponete a nostro conto e ragione. Fatta dì V ottobre 339."

Another of 1359 refers to the sending of a duplicate draft, one only to be valid:

> "Giovanni spiafami et comp. da Lucca in Vignone.
>
> "A lo nome de Dio Amen. Fata di sete de marzo MCCCLVIIII, Giovani e compagni, Paulo paruta e compagni. Salute de Venegia.

"Pagerete per questa prima e per la segonda letera, una fiata, a dì VIII uista la letera, a ser Amadio notaro de la corte mazore di Venegia over a messer Napoleone de puntiroli o al qual di loro presentasse questa lettera, fiorini duo milia d'oro al peso de la sentenzia, li qual sono per cambio di ducati duo milia che navemo recevuto qui da li camerlengi del comune de Venegia, zoe la meta avemo abuto contati e l'altra meta deuemo avere a dì primo di aprile prosimo. Faretene bono pagamento e ponetteli a nostro conto. Lo pagamento uol esser fiorini de firenze.

"Jo dauino Jacobi sono contento di essere tenuto del sovradito cambii." [Davino Jacobi signs as security for payment.]

Towards the end of the XIV Century it was still the civil law that if a draft was dishonored recourse was to be had against the drawer only on the legal basis of the bill of exchange. But here as elsewhere the customs of the merchants had been effecting important changes and the law in their courts had already become different from the civil law. It was presumed *ex æquitate mercatoria* that the drawer of a draft promised to be liable for its payment, and so the fundamental bill of exchange behind the draft became superfluous and the true exchange stood revealed in the form of a draft, while the bill of exchange gradually sank into disuse. The drawer's promise was presumed to be a general one to the payee, thus admitting of successive assignments, for both order and bearer-clauses were inserted in the drafts, by analogy to the bills of exchange. The draft did not become truly negotiable through indorsement until the XVI Century, but there certainly existed at an earlier period some sort of informal negotiability, because of the system of discount and clearing which we have already mentioned.

The acceptance of the draft is also met with, and was informally binding. According to general principles it freed the drawer from liability. But in the XIV Century such acceptances were to be found on bills of exchange and it was a rule of the merchants' law, recognized in the Genoese practice, that the drawer was liable in spite of the acceptance.

Sureties for payment were known as early as the XIII Century; the surety often signed that word beside his name.

Duplicates are in use by the XIV Century, as we have seen,[628] and always with the clause of annulment in case the original has been paid.

Protests were in general use in the XIV Century and in the same way as today. They were drawn up by a notary and gave the payee of the bill of exchange the right to maintain his remedy against the drawer. It also gave the payee the right to raise the sum due by making a loan, to pay himself, in the name of the drawer.

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[628] Above, p. 222.

The time of payment was quite variable. It might be at the time of a fair, or at a given date, at sight, or after sight, or on demand. Short statutes of limitation are met with as early as 1509, two years being the time specified.

The course of exchange appears at the beginning of the XIII Century in connection with the broadening of the field of exchange.

Executive proceedings to enforce these instruments follow the general rules, but the statutes provide for an especially summary procedure, for the limitation of permissible exceptions, and for imprisonment as the chief means of enforcing the execution.

There is very little regulation by law and usually only in connection with some special point, since exchange was mostly dealt with in connection with other legal principles.

The Church did not oppose the true exchange as such, but only those cases where it was used to evade the prohibition against usury. Yet here, as in general, the purpose of the Church was frustrated by the power of commerce.[629]

REPRISALS

We now come to the very important subject of reprisals, one that occupied the general attention of the Middle Ages to a very considerable degree; one that was of importance in modern days, until the last century; and one that could conceivably arise again. Like so many of these matters, reprisals has a double aspect. It originated in semi-private, domestic affairs, but it came to be of public importance and occupied a large part of the early content of international law.[630] When we come to examine the book of the earliest writer on international law, Legnano, published about 1360, we find that he treats of international law under three heads, private war, public war, and reprisals. And the best short definition of what reprisals were, is to be found today in the book of a writer on international law.

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[629] Authorities for this section: Huvelin, pp. 552–575; Goldschmidt, pp. 314–315, 383–465, and notes, and many original documents there cited.

[630] Nys, p. 63. "La matière des représailles mérite de fixer l'attention; elle donne la clef de plus d'une pratique du droit des gens et fournit un chapitre qui ne manque pas d'intérêt à l'histoire du développement des relations internationales."

> "Reprisals (repressalia) were based on the solidarity which according to ancient views, still far from having ceased to operate, existed between a prince and his subjects or between a city and its citizens. A wrong done by any of them to a foreign prince, city or person was the wrong of all, and all were answerable for it; the cause of any of them who had suffered a wrong from a foreign prince, city or person was the cause of all, and often in practice all took it up, though perhaps in theory it was only for the wronged one or his prince or city to do so. Together with this there worked another mediæval principle, that of self-help as a primary mode of redress. Even in England the history of our law teaches up that civil procedure at first rather came in aid of self-help than was looked on as being in itself the proper and whole remedy. It is necessary to dwell on this aspect of the case because it must not be supposed that the difference between self-help against the foreigner and war was not well known in the Middle Ages. . . ." [631]

One will find this distinction plainly recognized in Legnano.

> "That a person who had a grievance against a foreigner should capture ships and cargoes belonging to him, or to those whom general opinion regarded as being solidary with him, was no more deemed shocking or exceptional in a state of peace, than a man's forcibly retaking his goods from a neighbour who had despoiled him of them was deemed to be inconsistent with the internal peace of a country. Nay, that he should capture and detain the persons of the fellow subjects or fellow citizens of his alleged debtor—for to that extent reprisals went—was a natural conclusion from the principles of solidarity and self-help, applied when imprisonment was deemed the natural remedy for debt.
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> "At least as early as the thirteenth century, however, the practice of reprisals was restrained by the conditions that the license of the self-helper's sovereign was to be first obtained, and that property captured at sea could not be appropriated without a sentence of the admiral.[632] The license was granted by letters of marque or of reprisal, or of marque and reprisal. The former term has been connected by some with *marca,* a boundary, the letters being an authority to make captures outside [633] the boundary of the territory; but it may be derived much more easily from *marcare* or *marchiare,* words which are found in documents of the thirteenth century in connexion with *pignorare,* apparently in the sense of marking goods for a claimant's security. If the prince on the other side considered the claim to be unfounded, or the compensation obtained to be excessive, he issued letters of *contre-marque.* The measures which a subject was thus licensed to take for his own redress were called special reprisals. General reprisals were resorted to by princes in pursuance of

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[631] Westlake, Part II (War), p. 8.

[632] One would like very much to know what, if any, authority the learned author has for making this statement. On its face it appears to be incorrect, even if the very end of the century is referred to.

[633] Outside *or inside.* See Legnano, p. 314.

> their own claims, political or pecuniary, or for the redress of their subjects' griefs when they adopted them. The proclamation of general reprisals ordered the subjects to capture the property of the other prince and the persons and property of his subjects, and although not confined to the case of war they became a regular accompaniment of war."[634]

Such is a general definition of reprisals. It will be noted that it had its fundamental basis in the mediæval belief in the general identity of interest among all the inhabitants of a given city, or of the citizens of a given state. In the Middle Ages this belief was very real, and a local nationalism, confined to a city or to a small district, took the place of the larger, present-day patriotism.

The principle that lay behind reprisals was simple, tacitly involving a subrogation. *A*, of Hamburg, had done *X*, of London, some wrong, whether robbery, breach of contract, or misrepresentation of goods. It was difficult, risky, and expensive for *X* to travel to Hamburg in the endeavor to collect his damages. Let *X* seize the property of *B* of Hamburg, in London, and let *A* answer over to *B* in Hamburg, where both were citizens. In a disorganized condition of society, where justice may have been uncertain and the state's authority weak, reprisals undoubtedly filled a need, though only approximately. But as affairs became more settled, as the state gained power and improved its administration, as the gilds grew up and attained commercial jurisdiction, this state of affairs became intolerable to the merchants, and great (and to a considerable extent successful) efforts were made to end them, while the law of reprisals was regulated, restrained within narrower bounds, and reduced to an exact code. It was the abuse of reprisals that led to their suppression, but they were very frequently used in the Middle Ages, as Pardessus and Cussy agree.[635] It was the original need of the merchants in the earlier Middle Ages that held all the merchants from a given city responsible for the debts of any merchant from that city or for any act committed by one of their number, or by their city;[636] it was the later need of the merchants for safety and facility in their commerce that slowly did away with reprisals by the operation of treaties and of laws.[637]

We must now speak briefly of the general history of reprisals, and then of the later codification of its rules.

[634] Westlake, Part II (War), pp. 8–9.

[635] Cussy, p. 125.

[636] Nys, p. 63. "La théorie des représailles s'appuie sur l'idée que ce qui est dû par un corps est dû par chacun des membres dont il est composé."

[637] Mitchell, p. 121.

Reprisals originated at the beginning or in the middle of the XII Century, when the Count Rudolph de Capraja, having been refused satisfaction for a debt by the city of Pisa, obtained permission from the Emperor Frédéric II's vicar in Tuscany to repay himself by seizing the goods and persons of the Pisans.[638]

This means of obtaining reparation for injuries of which one had been the victim was too simple and too convenient not to spread rapidly. Soon reprisals became a regular institution which existed not only for the profit of the State and of corporations but even of private individuals, and it became a menace to general commerce quite comparable, and in some ways similar, to piracy. It is not even necessary to indicate the great abuses of which such a system was capable, since they are obvious, and they led to perpetual troubles and even to war. Such an instance was the seizure of the Duchy of Guienne from Edward I by Philippe le Bel, and, as it was probably typical of many such incidents, we shall give an account of it, following Nys.[639] About 1292, two sailors, one Norman, one English, quarrelled in the port of Bayonne and came to blows, the Englishman wounding his opponent. As the magistrates of Bayonne did not act, the Norman sailors appealed for justice to Philippe le Bel as king of France, but he, too, took no action. Thereupon the Normans took the law into their own hands, seized the first English vessel that they came across, and hung everyone on board. The English sailors replied with similar acts of violence, and matters promptly reached the state where each party sought alliances quite outside the aid of the government. The Normans were supported by the Irish and the Dutch; the English by the Flemings and the Genoese, and two hundred Norman ships held the English seas, massacring every English sailor whom they captured. In defence, the English armed a fleet and killed, it is said, several thousand Normans. At this point the respective kings took up the cause of their subjects and Philippe le Bel cited Edward I before a court of his peers for felony. Edward not appearing, Philippe thereupon seized the Duchy of Guienne. Here we can see the origin of an earlier War of Jenkin's Ear, and the serious results apt to follow from apparently trivial incidents. We shall not be surprised to know that, almost from the first, efforts were made to end a state of affairs so pregnant with unfortunate consequences.

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[638] Morel, pp. 44–45.

[639] Nys, pp. 63–64. A very full account of this episode differing slightly in details, is also to be found in Hannay, *A Short History of the Royal Navy,* 2nd ed., pp. 18–19.

The first efforts seem to have been made by the merchants travelling to the great fairs, who were naturally exposed to seizures along their entire route of travel, and it was ordained from year to year that such merchants were to be exempt from the usual sort of reprisals.[640] This exemption extended only to reprisals arising out of matters happening outside the fairs; in regard to debts contracted and offences committed within the fairs, the guardians of the fairs most rigorously maintained the right of reprisals, and even employed a further means of compulsion on a city that refused or delayed to do justice, the prohibition[641] to all its citizens of attending the fairs until the matter in dispute was satisfactorily adjusted.[642] By the XIV Century this specially granted exemption had apparently become a matter of usage and of the common law, at least within the general territory of the fair, according to Bartolus, who also states that those who were shipwrecked or who were forced by a tempest to take refuge in some port were equally exempt.[643]

The next step was to sign conventions suspending the exercise of reprisals for a period of some years,[644] and finally the attempt was made to abolish them absolutely. In 1154 an agreement was made between Pisa and the Sultan of Egypt, that the latter would in all cases suspend the declaration of reprisals on Pisan merchants for a period of one year in order to allow the Pisan authorities time within which to make reparation.[645] In France in 1193 Philip Augustus ordained that the merchants of Ypres were to be arrested only when they had become express sureties. In 1229 Venice signed a treaty with the Prince of Aleppo, who agreed to abstain from reprisals even in the case where a Venetian had robbed a subject of his.[646] In 1290 Genoa signed a treaty with the Sultan of Egypt which was designed to bring to an end a series of mutual reprisals.[647] The emperor Andronicus III (1328–1341) made a treaty with Narbonne by which he agreed that he would not hold their merchants liable for injuries done to subjects of the Empire by Narbonnaise corsairs.[648] By a treaty of Oct. 4, 1352, the Czar of Bulgaria agreed with Venice that he would not hold any Venetian merchant responsible for the torts or the debts of another.[649] One Raymond Seraller had loaded merchandise on a vessel of Rhodes which was seized by a Venetian fleet in 1353. He made complaint at Venice, but unsuccessfully, and the Regent of France issued letters of marque to him, but the consequence of this measure was that the Venetian commerce ceased to come to the South of France, and in order to attract the Venetians to the French markets again it was necessary to write often to Venice declaring that these letters of marque had long since been suppressed.[650] In 1381 Queen Elizabeth of Hungary established by charter that Austrian merchants trading in Hungary should not be liable except for their own personal acts or misdeeds.[651] Edward I forbade the application of reprisals to English merchants within England, and Edward III by the Ordinance of the Staple extended this privilege to foreign merchants, but reserved the right to issue letters of marque as he saw necessary.[652] None the less, this was a decided gain, as it left the issuance to one single central authority.[653] In France the usage of reprisals was abrogated by the *ordonnance* of 1485.[654] All through the XIII Century the great Italian cities attempted to limit reprisals by treaty, and in the following century the city of Florence was especially a leader.[655] But in the early XIII Century Florence is already to be found negotiating to the same effect, as is witnessed by a treaty of May 30, 1214, made between the Pisan government and the special plenipotentiary of Florence, which establishes the rule that if a citizen of one state owes anything to a citizen of the other, recourse is to be had only against the debtor or his guarantors, and not against his fellow-citizens in general.[656] By the Florentine statutes reprisals were not to be granted save in a full council, the persons to whom reprisals were granted had to give security not to exceed their authority, and reprisals issued against Florentines were to be considered. The Florentine ambassadors also were urged to make treaties abolishing reprisals except for robbery.[657] If thus there had been suppressed a great abuse, at the same time all efficacy had been taken away from reprisals, since thenceforth the plaintiff had no remedy other than the pursuit of the defendant, and this, as we have seen, was frequently vain or too long or too difficult.[658] It was therefore necessary to find a substitute, and this was done by enlarging the gilds' jurisdiction, and in developing and increasing the power of the *notarius mercanziæ*,[659] as we saw when we examined the general matter of the growth of the gilds. At Genoa the same result was achieved by the institution of the *Officium Robarie* to give redress to any merchant who had been robbed by a Genoese.[660]

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[640] Morel, p. 47.

[641] Huvelin, pp. 442–443.

[642] See Appendix II for such a correspondence dating from the end of the XIII Century.

[643] Nys, p. 71. Legnano, p. 319.

[644] Morel, p. 47.

[645] Heyd, I, p. 393.

[646] *Ib.*, p. 377.

[647] *Ib.*, p. 415.

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[648] *Ib.*, p. 481.

[649] *Ib.*, p. 531.

[650] *Ib.*, p. 480, n. 3.

[651] Mitchell, p. 122. Similar treaties providing that an individual should be held responsible only for his own acts and debts are to be found in Mas Latrie, *Relations*, pp. 172–173.

[652] This was claimed as an exclusive right of the royal prerogative, Nys, p. 73. "En Angleterre, un statut promulgué sous Édouard III dispose que le roi a le droit de marque et de représailles."

[653] Mitchell, p. 121.

[654] Cussy, p. 125.

[655] Mitchell, p. 122.

[656] Morel, p. 47.

The Hanseatic cities adopted a different but very excellent rule, and one which may possibly have been based upon the general customs of the fair courts in Champagne.[661] The rule was established that a merchant was not to be arrested, nor were his goods to be seized, for the act of another, and also that a city was not to be considered responsible for the acts of its citizens so long as its courts were freely open to a plaintiff. Further, and most important of all, by mutual treaties a judgment rendered in any Hanseatic city was declared to have executory force in every other city.[662] This was a great step forward, which, with the liberty of commencing a judicial action, removed the need for reprisals.

In the XV Century reprisals were much rarer. In England Henry V carried on the work of Edward III. Unwarranted aggression against foreigners was declared to be high treason,[663] and by a statute of 1416, the king reserved the right to grant reprisals *where treaties had not abolished the usage*. Such letters were to issue under the Lord Keeper of the Privy Seal.[664]

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[657] Mitchell, pp. 122–123.

[658] Morel, p. 47.

[659] *Ib.*, pp. 48 ff. Lastig, pp. 271–272.

[660] Bensa, p. 24.

[661] Huvelin, pp. 426–428.

[662] Nys, p. 68.

[663] Mitchell, p. 123.

[664] Nys, pp. 73–74. "Sous le règne de Henri V, un statut de 1416 porte que le roi accordera des lettres de représailles, à moins qu'un traité n'en ait aboli l'usage. D'après ce statut, les parties doivent s'addresser au lord garde du sceau privé,

Perhaps one of the roots of the corporation with limited liability is to be found as a result of this system of reprisals. All the merchants of the same society or company were united among themselves by a general solidarity, and therefore any one was liable for an act done in the name of the society. But this liability was generally limited to the individual's interest in the society until the XVI Century, both in Italy and in France, which followed the general common law. There were a few special exceptions to this general rule, of which the most conspicuous were the fairs of Champagne, whose system of reprisals held any and every merchant to an unlimited liability, not merely as regarded his joint interest in the society but also in respect to his outside personal resources, for the obligations contracted by his society at the fair.[665]

Let us now briefly consider Legnano's mediæval treatise and textbook on the subject of reprisals, to which reference has already been made. The book was written about 1360, and, apart from its interest as the first text on International Law, it shows to us that even then publicists were endeavoring to codify usages, selecting the best, and, where possible, ameliorating violence. According to Legnano there were no reprisals until the late days of the German Empire, because at an earlier time there was no need for them since "all were in subjection both in law and in fact" and "the complement of justice was administered by princes, with observance of the due order of law. . . . Its final object is that justice may obtain its due effect, and its occasion is when there is a failure of remedy, arising from the neglect of those who govern and rule peoples, and the absence of recognition of superiors in fact, at which time this extraordinary remedy is

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lequel expédie des lettres de réquisition pour obtenir satisfaction ; si dans un temps convenable la partie requise ne satisfait pas, le lord chancelier délivre à la personne lésée des lettres de marque sous le grand sceau, en vertu desquelles elle peut attaquer et saisir les propriétés des sujets de l'État agresseur, sans encourir le danger d'être condamnée comme brigand ou pirate."

[665] Huvelin, pp. 483–484. Goldschmidt, pp. 283–285. "Selbstverständlich haftet für die gültige Gesellschaftsschuld das Gesellschaftsgut und insoweit jeder Gesellschafter *in solidum*. Dagegen dasz darüber hinaus die Socien auch mit ihrer Person und ihrem Sondergut, somit nicht nur solidarisch, sondern auch unbeschränkt haften, versteht sich keineswegs von selbst, ist sogar für Italien nicht allgemein nachweisbar und mag zwar in einzelnen, insbesondere longobardischen Gegenden Italiens aus ursprünglich allgemeiner Güter- und Schulden-Gemeinschaft der primitiven Familienwirthschaft im Interesse des Handelsverkehrs herübergenommen sein, im Uebrigen aber in der allgemeinen Uebung der Ausbedingung solidarischer Haftung, vielleicht auch in dem insoweit aufrechterhaltenen Repressaliensystem wurzeln."

needed. . . . Only one who has no superior, both in law and in fact, may declare reprisals. Also he against whom they are declared should have no superior, or, if he has, that superior should neglect to do justice." [666]

"Recourse must first be had to the ordinary remedies, and only if they fail, to this remedy; and this should be ascertained by a judge who is asked to declare reprisals; and if the person against whom they are claimed appears after notice given, he is heard for the defence, as will be shown below, and judgment follows, either awarding or refusing the declaration." [667]

Reprisals may be granted to residents who are not citizens, to naturalized citizens where the injury took place after naturalization, even, as the result of treaty rights, to the citizens of another state.[668]

Reprisals are declared against "the property, movable and immovable, of those against whom they are granted, which is found in the territory of the state which grants them." [669] Execution cannot be granted against the necessaries of a student or of an ambassador. Legnano even holds that property may be seized in the territory of the state against which reprisals are declared, though admitting that the authority is against him.[670]

Reprisals may be executed not only against citizens of another state but also against residents there, provided that they "bear the burdens of the state." As to citizens of the state living outside of it opinion was very divided. Although persons might be citizens of the state they were residing in, if they continued citizens and "bore the burdens" of the old state against which reprisals were declared, they were liable. Reprisals cannot be executed against those on their way to a festival, on a pilgrimage, or going to a place of indulgence, or against those brought into port by hostile winds or summoned into court.[671]

Under certain circumstances reprisals may be declared directly against the officials of a magistrate or ruler who does injustice, even against the leaders and consuls themselves, provided that they were present and refused to do justice. They may be declared against private persons because of the fault of the lord.[672]

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[666] Edition of the Carnegie Endowment for International Peace, pp. 307–309.

[667] P. 309; cf. p. 322.

[668] Pp. 310–314.

[669] P. 314.

[670] Pp. 314–315.

[671] Pp. 316–319.

> "The material cause from which reprisals arise . . . is a failure of jurisdiction. For in the first instance a judge ought to be applied to; and if he neglects to deal with the matter, and recourse cannot be had to a superior, then reprisals may be granted." [673]

The injured party applies to the judge of first instance to do justice; if he neglects it, appeals to the next superior; if still neglected, appeals to the prince. Neglect here entitles him to reprisals. But if it is not a case of neglecting justice, if the judgment is unjust, he may appeal, when, if the judgment is upheld, he is out of court, provided that there was neither favor to the other party nor to the prince. If there is no judge of appeals, reprisals will be declared, "for some blame must be imputed to a state which has not appointed a judge of appeal." Reprisals will not be granted for slight cause; a complete failure of justice is necessary, because, as Legnano sagely remarks, "reprisals do not completely do justice." If resort to a superior ruler is in fact very difficult or impossible, reprisals may be declared without such an appeal.[674]

Reprisals are granted by those who do not recognize a superior (note the carefully chosen phrase to fit the case of the Italian cities nominally subject to the Emperor) and all that is required is that the cause for which it is granted be true, saving to the other party any defences granted by law. "The burden of proving that all things required by the law of nations have been duly observed would rest upon the person to whom the reprisals are granted." Anyone who has an interest may appear to oppose a declaration of reprisals; this includes any citizen of the state against which they are declared, and any citizen of the state declaring them, because he is "interested in preventing an unjust declaration, for fear of retaliation." *Exceptiones* may be pleaded.[675]

One to whom reprisals have been granted may seize persons, provided recourse cannot be had to a judge, but must later present them to a judge. Property is held by reason of the reprisals. But execu-

[672] Pp. 320–321.

[673] P. 322.

[674] Pp. 323–324.

[675] Pp. 324-325.

tion may not take place on religious holidays, though it may on civic ones.[676]

Full execution is apparently the only defence to letters of reprisal.[677]

The person from whom the exaction is made may probably sue the person on whose account the exaction was made; if he is insolvent, then the ruler may be sued, "snice he, too, becomes a debtor by refusing justice"; while it is certain that the judge at fault may be sued.[678]

A person from whom exaction is made, though unlawfully, must not seize persons of the state at fault without first securing reprisals from his own state. Reprisals may not be granted by statute (except against fully subject states) in cases not permitted by the common law.[679]

Thus the reader will have seen that a fairly satisfactory and reasonable codification had been arrived at, although at a period when the use of reprisals was on the decline.

Mutual insurance was also developed by the end of the XIII Century to safeguard against risks arising from letters of marque and from reprisals;[680] but this is a matter that belongs more properly to the section devoted to that subject.

INSURANCE

In this section we propose to write of the historical origins of the contract of insurance with regard to transport, of its general provisions and terms, and, finally, of a few special provisions of insurance in other fields, which appear during the mediæval period.

According to Smith's definition,[681] approved by Sir William Holdsworth,[682] insurance is "a contract by which one party (the insurer) undertakes to indemnify another (the insured) against loss, in consideration of a premium." In this special and modern form insurance dates only from the opening of the XIV Century,[683] and, as we shall presently see, like many other commercial institutions it was developed in Italy in response to the needs of the merchants.[684] As M. Lefort has well said, we do not owe the contract of insurance to the genius of a legislator; rather is it the last step in a series of evolutions designed to guard against the risks of commercial transport;[685] and in the sequence of these steps we can study the development of the contract. As we have just noticed, there is no evidence to prove that insurance, as we know it, antedates the XIV Century, but other arrangements, designed to achieve the same approximate effect, have existed since Greek days and perhaps before;[686] so that it is necessary to study the ancient and mediæval systems in order to understand the modern.[687] In our examination of the maritime loan, as practised in antiquity, we have seen that the risk of loss might be the subject of a special stipulation. The carrier was freed from certain liabilities by Roman law, but there was no objection to adding a special stipulation by which he assumed the risk, and, as a practical result, the goods were thereby insured.[688] One recalls the two classic references of Roman days, by which the carrier,[689] or even the consignee,[690] might assume the liability of loss in transit. The maritime loan itself was, in reality, only an ordinary loan united to a contract of insurance, whose premium was represented by the higher rate of interest payable,[691] and which, like the later mediæval insurance, gave rise to much speculation. In consideration of the higher interest (the premium) the borrower was not liable to repay the loan if the ship was lost.

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[676] Pp. 326-327.

[677] P. 328.

[678] P. 329.

[679] Pp. 329-330.

[680] Goldschmidt, p. 356. "Weiter begegnen Verbindungen zum Gegenseitigkeitsersatz von Represalien." Lefort's French Introd. to Bensa, p. vii, n. 4. "L'assurance mutuelle . . . existait à Narbonne et à Montpellier sur la fin du treizième siècle, et vraisemblablement en Italie . . . des associations d'assistance mutuelle contre les lettres de marque ou de représailles."

[681] Smith, *Mercantile Law,* 11th ed. p. 451.

[682] Holdsworth, *H. E. L.,* VIII, p. 274.

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[683] Bensa, pp. 45–54. Mitchell, p. 141, "As a special contract insurance dated from the opening years of the 14th century." Lefort's French Introd. to Bensa, p. vi. "Considérée comme contrat principal, l'assurance maritime ne fut réellement connue qu'à partir du quatorzième siècle."

[684] Lefort, pp. vii–viii.

[685] *Ib.*, p. vi.

[686] Above pp. 5, 7. Lefort, p. vii. Holdsworth, *H.E.L.*, VIII, p. 274.

[687] Bensa, p. 8. "E, per fermo, havvi da un lato l'autorevole testimonianza dell' Emerigon, il quale . . . fa omaggio alla sapienza di questi antichi monumenti, riconoscendo che le norme in essi contenute sono tanto maggiormente attendibili; e d'altra parte di queste opinioni del giureconsulto marsigliese abbiamo la conferma negli stessi antichi contratti di sicurtá, in cui si trovano contenuti pressoché tutti gli elementi e le clausole piú importanti che si riscontrano nelle polizze odierne, sicché puossi a buon dritto conchiudere col citato autore, che é difficile di bene intendere molte delle norme del diritto moderno, ove non si risalga all'antico."

[688] Lefort's French Introd. to Bensa, pp. vi–vii. "Considérée comme contrat principal, l'assurance maritime ne fut réellement connue qu'à partir du quatorzième siècle. Mais, aux époques antérieurs, elle fut pratiquée d'une façon implicite. À Rome d'abord. Abandonnant à la longue leur superbe dédain pour le commerce maritime, les Romains, qui avaient parfaitement su introduire dans les textes légaux l'idée du déplacement du péril, considéraient qu'il était permis d'assurer, en vertu d'une convention particulière, des risques dont le droit commun affranchissait, ils trouvaient pratique d'ajouter accessoirement une clause de garantie à un contrat de transport. D'autre part, comme les Grecs, les Romains pratiquaient le contrat à la grosse, qui, dans la réalité des choses, n'était que la réunion au contrat *mutuum* du contrat accessoire d'assurance, et qui donnait certainement lieu à de vastes spéculations."

In most of the contracts of loan or exchange in the Middle Ages the element of risk appears very plainly, the terms varying according to whichever party assumed it. In the same way, merchandise might or might not assume the risk, as the result of special stipulations, either *salvi in terra,* or *a rischio, pericolo e fortuna di mare e genti,* or *ad risicum et fortunam Dei, maris et gentium.*[692] For instance, an indirect form of insurance was in use as early as the XII Century, in which the freight paid varied according to the assumption or non-assumption by the ship-owner of the risk of safe delivery.[693] It was only natural that the early insurers of merchandise should be the ship-owners in whose ships the goods were loaded, since they could most easily protect the goods and guarantee safe arrival; and, as they understood best the probability of peril in transport, they could charge the smallest premiums.[694] As we have seen in the last section, by the end of the XIII Century one reads of mutual insurance by companies and groups against certain risks of the sea, such as those arising from letters of marque and from the use of reprisals.[695] In the XIV Century there exist side by side two quite different sorts of mutual insurance. The older and more primitive was based upon the *conserva,* the *colonna,* and such arrangements, and consisted of a fund raised as the result of mutual promises (sometimes these associations were legally compulsory). It borrowed its terminology from the later variety, where fixed sums were paid in at regular intervals as a true premium insurance. This latter form, though it developed in a speculative manner, borrowed from the former the principle of a common fund or reserve. But in the early part of this century neither one had begun to influence the other.[696] At Genoa the *Officium Robarie* was established to give redress to any merchant who had been robbed by a Genoese, and it is possible that this may have partaken of the nature of state insurance.[697] "Differences in commission or in share of profit were really premiums paid for the risk undertaken, and it was but a natural result that merchants began to make special contracts of insurance,"[698] but the stipulations in regard to the incidence of risk which were introduced into the ordinary commercial contracts, about the XIII Century, were more closely connected with the development of insurance.[699] According to M. Valery, some of the loans and contracts of sale of this

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[689] Cicero writes that the govvernment ought not to bear the risk of transport of public money, *Epist. ad Fam.,* II Epist. 17. "Laodiceæ me prædes accepturum arbitror omnes pecuniæ publicæ, ut et mihi et populo cautum sit sine vecturæ periculo."

[690] Claudius, probably from reasons of public policy, bore the risks from tempests of grain transported to Rome. Suetonius, *Life of Claudius,* Ch. 18. "Nam et negotiatoribus certa lucra proposuit, suscepto in se damno si cui quid per tempestates accidisset."

[691] See n. 688 above. *Pecunia trajectitia* is defined in Dig. XXII, 2, 1, as "Trajectitia ea pecunia est quæ trans mare vehitur . . . videndum an merces ex ea pecunia comparatæ in ea causa habentur? et interest, utrum etiam ipsæ periculo creditoris navigent: tunc enim trajectitia pecunia fit." Goldschmidt, p. 81. [at Rome] "Aus dem Seedarlehn entnahm man den Grundgedanken der anscheinend noch nicht als eigenthümliches Geschäft ausgebildeten Assekuranz auf Prämie, das 'periculi pretium' . . . 'Gefahrsvertheilung' begegnet schon früh; der für die Assekuranz leitende Gedanke der 'Gefahrsgemeinschaft' ist im Recht der groszen Haverei scharf entwickelt."

[692] Bensa, p. 21.

[693] *Ib.* p. 22, citing *Le Livre des Assizes de la Cour des Bourgeois,* Ch. 48, an old law treatise of the eastern crusading kingdoms, dating from 1173–1180.

[694] Bensa, p. 54. "E poi assai agevole il rendersi ragione del perché e primi

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assicuratori di merci fossero i proprietari delle navi su cui esse venivano caricati. A nessuno infatti puí che a costoro doverva parere facile ed ovvio il salvo arrivo della merce; niuno meglio di loro era in grado di custodirla e garantirne l'arrivo a salvamento. Il premio adunque, che altri avrebbe richiesto in elevata od esagerata misura, poteva essere assai piú tenue per costoro, tanto piú che nel caso di buon esito del viaggio esso risolveasi in un considerevole aumento del nolo."

[695] Above p. 234, n. 680. Goldschmidt, p. 356.

[696] Goldschmidt, pp. 355–356. "Die Gegenseitigskeitversicherung findet sich in folgenden Gestaltungen: Der genossenschaftliche Verband der Seefahrtsbetheiligten (*colonna* u. dgl.), wie die vertragsmäszige oder auch gesetzliche, nicht selten weit über die römischen Grundsätze hinausgehende Gefahrsgemeinschaft zwischen Rhedern und Ladungsinteressenten laufen praktisch auf eine Gegenseitigkeitsversicherung mit freilich auf das Seegut beschränktem Ersatzfonds hinaus. An den vertragsmäszigen oder gesetzlich gebotenen Convoy zusammenfahrender Schiffe (*conserva,* Admiralschaft) konnte sich eine Gegenseitigkeitsversicherung gegen Piraten-, Kriegs-Gefahr und dgl. knüpfen."

[697] Bensa, p. 24.

[698] Mitchell, pp. 142–143.

[699] Holdsworth, *H.E.L.,* VIII, p. 275.

period were never intended to be what they purport, but rather were contracts of insurance.[700]

It is, of course, difficult to state the exact sources of the contract of insurance. In the Middle Ages the merchants used a number of different contracts in which there plainly appears the element of risk. There is the *societas* where the risk is divided among all the members, and the *commenda,* where the entrusted goods or monies were usually handled *ad tuum risicum,* which included the ordinary chances of loss.[701] There is the loan, the *mutuum,* which endeavored to evade the prohibition of the church against usury by calling itself *mutuum gratis et amore* ("le contrat . . . n'avait rien de gratuit," remarks Lefort), in which the loan was not repayable in case of accident to the ship or the merchandise, in consideration of a deduction made from the sum nominally advanced. We may be sure that this deduction included ordinary interest and a further amount which would be a true premium of insurance.[702] There is the *cambium,* the contract of exchange, the contract of sale, and the maritime loan, which, coming into use in the XIII Century, by slow degrees became the bottomry bond, substituting a real right for a personal one and making the object of the risk liable for the debt.[703] The contracts of exchange and of sale and the maritime loan were all used to disguise loans which included the taking of interest and of a further sum which was really a premium in consideration of which the loan was not repayable if it was lost. As a disguise one also finds agreements providing for the repayment of a sum at some other place, or in a currency different from that of the loan,[704] into which, in a genuine transaction, the elements of transportation and of exchange would enter, thus providing a disguise for the interest and the premium.[705] Nevertheless, one finds the various terms, *commenda,* loan, sale, exchange, quite indifferently mixed up in actual practice.[706] The contract of sale was adapted as follows to meet the new conditions: in place of the debtor buying goods with the money loaned by the creditor, the creditor himself buys the goods and sells them by agreement to the debtor, the price being payable at a future date contingent upon the safe arrival of the original goods (or those into which they have been converted) at their destination, and including the sum loaned, ordinary interest, and special interest to cover the risk of loss.[707]

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[700] *Contrats d'assurance maritime du XIII^e siècle* (1916), analyzing documents printed in Blancard, *Documents inédits sur le commerce de Marseille* (cited Holdsworth, *H.E.L.,* VIII, p. 275, n. 4).

[701] Bensa, p. 23.

[702] *Ib.,* pp. 24–25.

[703] Lefort's French Introd. to Bensa, pp. vii–viii. "Au Moyen âge, les commerçants avaient recours à différents contrats dans lesquels apparaît assez nettement la notion du risque: le *contrat de société,* qui répartissait les risques entre tous les associés; le *contrat de commande,* issu des traditions romaines peut-être, mais en tout cas généralisé, appliqué surtout dans le midi de la France vers le quatorzième siècle, et qui conférait, au commandité la charge des sommes ou des marchandises *ad tuum risicum,* excluant le cas fortuit; le *contrat de prêt de consommation,* introduit pour tourner les prescriptions concernant l'usure et qui, bien que qualifié de *mutuum gratis et amore,* n'avait rien de gratuit, le prêteur ayant le droit d'opérer une retenue (sorte de prime d'assurance) en retour de laquelle il assumait les risques du prêt dans le cas où la restitution des derniers était subordonnée à l'arrivée à bon port du navire ou des marchandises; le *contrat de change,* variante du *prêt de consommation,* mais qui s'en distinguait, parce qu'il emportait l'idée d'un certain changement soit dans le lieu du payement, différent de celui du contrat, soit dans la nature des espèces à payer, différentes de celles qui avaient été reçues; enfin, et principalement, le *prêt à la grosse,* nommé aussi contrat de change maritime, entré en usage au treizième siècle, et qui, après avoir revêtu d'abord des formes très simples, arriva, par une évolution à la fois lente et continue, à se modifier complètement, de façon à substituer au droit personnel un droit réel, à faire porter la dette sur l'objet du risque."

But the maritime loan, which later developed into the modern bottomry, appears to be the most important of the many sources of the contract of insurance, when that contract first appears before us as separate and independent. This opinion is supported by all the earlier writers, such as Straccha, Santerna, and Molinæus, and it is adopted by the best opinion of modern times in a number of different countries, by Bensa,[708] by Goldschmidt,[709] and by Sir William Holdsworth.[710] We have already seen that in the earlier agreements are to be found all the proper elements of a contract of insurance, except for the fact that it was then a matter concerning solely the carrier and the owner of the goods, or the creditor and the debtor.[711] When these agreements are split up into their component parts, as we know them today, we have arrived at the independent contract of insurance. In the words of M. Bensa, "In order for the premium and the risk to split apart from the principal contract and to give life to an independent contract, in which the one should be the equivalent of the other, this only need occur, that a third person intervene between the purchaser who intended to purchase goods conditioned on safe arrival, and the vendor who intended to cast upon the other party the risk of the sea and of nations, and assume the risk of the cargo in consideration of the payment of the difference which the current rate of trade and of exchange had plainly established." [712] This separate contract by the third person is the true contract of insurance, which "merchants began to make . . . in the opening years of the 14th century." [713]

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[704] Ashburner, p. ccxxv; see above, p. 220; Bensa, p. 31.

[705] In a Florentine bill of exchange on England one can note the exact rate for insurance of the money transmitted—10 soldi per 100 marks. Bensa, pp. 31–32. "Innumerevoli esempi hanno le antiche carte di cambi stipulati a salvo in terra o a rischio di mare, e nella '*Practica della Mercatura*' del Pegolotti [p. 200] si hanno altresé le differenze sulla provvigione bancaria a seconda che il cambio da Firenze all' Inghilterra veniva contrattato all' una od all' altra condizione. Nel primo caso il banchiere percepiva una provvigione di 10 soldi per cento marchi: nel secondo di soli 20 soldi piccioli. Come vedesi, detratta questa seconda quantitá dalla prima, il residuo é né piú né manco che un premio di sicurtá."

[706] *Ib.*, p. 25, n. 2. In the *Archivio notarile di Genova* there are used the words, "Nomine accomendationis—nomine venditionis et puri cambii—mutuo gratis et amore, promiscuamente negli atti dei notai dei sec. XIV et XV."

[707] Bensa, p. 59. Holdsworth, *H.E.L.*, VIII, pp. 275–276.

[708] Bensa, pp. 59–60.

[709] Goldschmidt, p. 362, and n. 90. "*Straccha, de assec. gl. 15 no 2; 'Trajectitiam pecuniam, instar cuius assecuratio inventa est;'* so auch nahezu alle älteren Schriftsteller: *Santerna, Molinaeus, Hugo Grotius . . . Cauvet . . .* nennt zwar das Seedarlehen unter den Wurzeln der Prämienassekuranz, aber nur neben der groszen Haverei, Commenda und dem Kauf auf Seegefahr; diese

Thanks to the research of M. Bensa, it is possible to give both the time and the place of the origin of the contract of insurance with some exactitude. His research in the Florentine archives has established in the most positive fashion that in the first twenty years of the XIV Century insurance was practised in the principal commercial cities of Italy [714] as a matter of course, and that it was treated as a

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Gleichstellung ist irrig, wenngleich in allen diesen Instituten Tendenzen einer völligen oder theilweisen Gefahrsabwälzung hervortreten (s. insbes. S. 345 ff.) Sogar bei *Bensa* dürfte der Ursprung aus dem Seedarlehen nicht mit ausreichender Schärfe betont sein."

[710] Holdsworth, *H.E.L.*, VIII, p. 277.

[711] An interesting comparison of the maritime loan with the contract of insurance is to be found in Emerigon, *Contrats à la Grosse*, Ch. I, Sec. IV, §§ 3–4.

[712] Bensa, p. 32. Also Goldschmidt, p. 363. "Da jedoch in umgekehrten Falle —bei Eintritt des Seeunfalls— der Darlehensgeber nicht allein das Kapital, sondern auch die bedungenen Zinsen einschlieszlich der in diesen steckenden hohen Gefahrsprämie einbüszt, somit gegen blosze Gewinnhoffnung die ganze Gefahr auf sich nimmt, so fehlt noch das charakteristische Moment der Assekuranz: die Gefahrsvertheilung auf mehrere Vermögen, nämlich das definitive Opfer des Spekulanten (die Prämie) als Entgelt für die Abwälzung des befürchteten Schadens auf ein anderes Vermögen."

[713] Mitchell, pp. 142–143.

[714] Pardessus, V, p. 332; Bensa, pp. 46–50; and Goldschmidt all concur in its Italian origin. The honor has been claimed for Portugal, but the date given is much too late, and the type of insurance is the compulsory mutual insurance between ship-owners, so often practised between ship-owners in the Middle

necessary expense of doing business.[715] There have been preserved some of the account books [716] of Francesco del Bene and Company, the Florentine merchants, dating from 1318 to 1320,[717] and while

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Ages, and really a variety of the *conserva,* or convoy. Goldschmidt, p. 356. "Eine ausgezeichnete, aber anscheinend vereinzelte und vorübergehende Einrichtung bildet die in Portugal zwischen den Jahren 1367 und 1383 von Staatswegen errichtete Zwangsversicherungsgemeinschaft der Schiffseigenthümer." Nor did it come from Spain to Italy, but rather in the reverse direction. *Ib.,* p. 358, n. 74. "Dasz die italienische Assekuranz sehr früh nach Spanien sich verbreitet hat, ist um so natürlicher, als Ende des 14. Jahrh.'s zahlreiche Katalanen in Genua Assekuranzgeschäfte betrieben haben." Also Bensa, p. 81. Equally untenable is its ascription to Bruges, on the strength of the "Chronicle of Flanders," or of the policy of 1370, quoted by Bensa, which was made by a Genoese! Bensa, pp. 49–50. "Ed invero, all' infuori dell cittá italiane, non si ha traccia sino al presente di assicurazioni marittime a premio durante il secolo XIV altrove che a Bruges, ov'é menzione di sicurtá contratte nel 1370; ma, a tacere che piú antichi d'oltre a mezzo secolo sono i documenti che mostrano invalso il costume delle assicurazioni in Italia, sta a togliere ogni dubbio il fatto, che la sicurtá contratta a Bruges da Goffredo Demarini sul suo naviglio, poscia sinistrato nelle acque di Spagna, venne assunta da assicuratori genovesi, membri certamente di quella numerosa e fiorente colonia italiana, le cui relazioni cambiarie con tutti i paesi d'Europa sono attestate dai documenti messi in luce dal Brunner." Also Goldschmidt, pp. 358–359, n. 75. "Die Nachricht der im 17. Jahrh. geschriebenen *Chronyke van Vlaendern,* dasz der Graf von Flandern 1310 den Einwohnern Brügge's die Gründung einer *'Kamer van versekeringe'* wider See- und andere Gefahren gegen Prämie gestattet habe (*Pardessus* I, p. 356) steht vereinzelt und wird durch kein Zeugnisz bekräftigt. Allerdings begegnet in Brügge . . . 1370 die Prämienversicherung, aber von einem Genuesen daselbst eingegangen (*Bensa doc.* 10); in den Brügger Archiven finden sich seit 1444 datirende Mittheilungen über daselbst geschlossene Versicherungen . . . die Assekuradeure sind Genuesen, Florentiner, Venetianer u. s. f.; auch ist daselbst in einem Schössenspruch von 1377 eine 'chartere van zecggerscepe' (Versicherungs polize) erwähnt, aber nicht mitgetheilt. Auch die zur zeit bekannte älteste, für ein Lübisches Schiff 1531 in Antwerpen ausgestellte Deutsche Polize . . . enthält unter 44 Assekuradeuren fast ausschlieszlich italienische und spanische Namen." And see Martin, *Hist. of Lloyd's,* p. 6. "The words of the 'Chronyk van Vlaendern' are: 'On the demand of the Inhabitants of Bruges, the Count of Flanders permitted, in the year 1310, the establishment in this Town of a Chamber of Assurance, by means of which the Merchants could insure their Goods, exposed to the Risks of the Sea, or elsewhere, in paying a stipulated Percentage. But in order that an Establishment so useful to Commerce might not be dissolved as soon as formed, he ordered the laying down of several Laws and Regulations which the Assurers, as well as the Assured, are bound to observe.'" As there is no confirmation of this statement in any contemporary evidence, the fact that there was a Chamber of Insurance at Bruges at so early a date, as well as the existence of the modern form of marine insurance there at that period, has frequently been doubted. But no good reason can be given for such doubt.

[715] Bensa, p. 50.

[716] They are to be found in Bensa, App., *Documents,* i, pp. 184–189.

[717] Bensa, pp. 48, 51–53.

they show the undeniable use of insurance, they also establish several other matters equally interesting. In the first place, they tell us of the channels in which commerce flowed at this period, and of its great extent. As we have seen, commerce was first localized in the fairs, and a contemporaneous proof is supplied by the fact that we find Del Bene and Company trading regularly in the fairs of Champagne and of Provence, and later in those of Flanders, Brabant, and northern France.[718] Now out of this there develops an important conclusion. When one examines the insurance effected by Del Bene and Company, as shown in their books, one notes the route taken by their goods, and this route lay through France to Avignon and to Nice by land, then from Nice to Pisa by water, and from Pisa to Florence by land again.[719] Thus the major part of the route lay by land;[720] furthermore, practically all the commerce of the great fairs lay by land, a result which compels the modification of the emphasis hitherto laid on the development of the contract of insurance through transport at sea. Now it is undoubtedly true that the earlier contracts, in which we have studied the element of risk, were chiefly contracts of maritime transport. At the same time, there had previously been developed a contract of "Land Loan" on the complete model of the maritime loan;[721] and the evidence seems to point to an almost equal importance of the one with the other at this period, with any small difference in favor of the maritime transport. Undoubtedly the earliest contracts of insurance dealt with the transport of merchandise and cargo only,[722] and then, soon, with the risks arising out of the transport of money[723] used in commerce. Later, one insured the ship itself, freight, money loaned,[724] and even life.[725] In

[718] Bensa, p. 50. For wider Italian commercial relations see above, p. 153, n. 164.

[719] Above, p. 241, n. 716.

[720] Goldschmidt, p. 381, n. 144. "Die Tücher der *arte di calimala* . . . gingen nach Frankreich und weiter von Florenz nicht allein zur See; die Assekuranzverträge für die Transporte von Flandern, Brabant, Frankreich u. s. f. nach Florenz 1318 ff. . . . betrafen ganz oder zum Theil Landtransporte."

[721] *Ib.*, p. 347.

[722] *Ib.*, p. 359, n. 76.

[723] Bensa, p. 51. "L'assicurazione avesse di già ricevulto ampio sviluppo, contraendosi cosí pel rischio del viaggio di nave, come pel rischio del trasporto di terra ed anche pel rischio del danaro."

[724] Goldschmidt, pp. 358–359. "Die moderne Prämienversicherung ist unzweifelhaft in den Mittelmeerländern entstanden, und zwar zunächst als Seeversicherung für den Waarentransport, demnächst anscheinend als Landversicherung für den Waarentransport, endlich als Kasko-, Fracht-, Seedahrlehens-, ja bereits im 14. Jahrhundert als Lebens-Versicherung."

[725] See below, p. 261.

the opinion of Goldschmidt the insurance on merchandise and cargo developed out of the maritime loan, and especially from its sister, the "Land Loan," of which we have just spoken,[726] and was first extended to maritime transport and then to land transport. There are other references which may be to insurance at about this time, but they are doubtful.[727]

During the entire XIV Century the practice of insurance increased and spread. The word itself, "insure," is met in its technical meaning [728] as early as 1347, and as far away from Florence as Sicily, and a whole series of usages lead up to the Florentine declaration in 1395 that to insure is the custom of merchants.[729] In the same year of 1347 we meet with the earliest known policy of insurance, made at Genoa on October 23 of that year, "towards evening." In form the document appears on its face to be a promise to pay a (fictitious) loan, the repayment being conditional on the happening of a future contingency, namely, any misfortune to the insured vessel. The influence of the Church, with which we shall shortly deal, is shown by the care taken to avoid the appearance of usury. Because of its great historical importance we give the document in full, below, as taken from the appendix of Bensa.[730] This contract, it will be seen at once, is copying the form of the maritime loan, just as the latter had adopted the form of the ordinary loan, the *mutuum*. It was as much a development as a change. In the maritime loan the debtor acknowledges that he has truly received the money in question, and that he is obligated to restore it in some other specified form, excepting only the maritime risk; on the other hand, in insurance the debtor (the insurer) pretends to have received the sum insured and promises to pay it to the creditor (the insured) at a fixed date unless the ship or the merchandise shall arrrive in safety.[731] Such is the substance of all of the oldest contracts of insurance that have come down to us, and for a long time we can still see clinging to insurance, as Goldschmidt has said, "the egg shell of the maritime loan." [732] And just as we have already seen that it was natural that those who first assumed the maritime risk should be shipowners,[733] so it was equally natural that those who first prepared the contracts of insurance were the brokers and notaries who were used to drawing up maritime loans and contracts of affreightment,[734] and from these latter contracts such technical terms as "policy"[735] and "premium" were taken;[736] just as many provisions were taken over into the new contract from the old. But even at a later time, when insurance had become recognized as an independent contract, it was necessary that it be concealed under the various disguises that we have noticed, in order to avoid provoking the decision of the Church that it was illegal because it contravened the canon law against usury.[737]

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[726] Goldschmidt, p. 362.

[727] *Ib.*, p. 359, n. 78. "In meiner Abhandlung hatte ich bezweifelt, dasz die, von *Bensa* nicht berücksichtigen, Bestimmungen der Vulgarredaktion des Statuts der *Calimala* von Florenz . . . 1332 *lib. I, c. 26, lib. II, c. 4* die Assekuranz betreffen . . . auch die in *lib. I, c. 46* befindliche Stelle, welche sich wörtlich gleichlautend bereits in der inzurischen (1889) publizirten lateinischen Redaktion von 1301 *lib. II, c. 4* findet: '*Si vero aliqui mercatores euntes extra Florentiam vel mercantes fecerint inter se pacta vel ordinamenta de aliquo rischio de avere quod portaverint, consules compellant tam ipsos viatores quam eorum socios et magistros ea efficaciter observare*' schwerlich ausschlieszlich auf Commendaverträge (auf welche die Ausdrücke *portare, socii, magistri* hindeuten) beziehen."

[728] Goldschmidt, p. 361.

[729] *Ib.*, p. 361, n. 85a. "Die notariellen Vollmachten in Sicilien 1347 ff. enthalten die 'facoltà di—*accomendando, cambiando, permutando, arrisicando, assecurando, mutuando*' . . . Dasz es sich hier um Assekuranzen im technischen Sinne handelt, zeigt die von *Bosco* . . . *consil.* 369 (*Bensa* p. 61) mitgetheilte Vollmacht zum '*mercari et negotiari emendo, arrisicando et contractando,*' welche *Bosco* auf die Assekuranz, welche er '*assecuratio*' nennt, bezieht. Bereits um 1370 braucht *Franco Sacchetti* . . . die Ausdrücke *assicurare* und *sicurare* gleichmäszig für die Seeversicherung; *sicurare* in der gleichen Bedeutung findet sich . . . in der ungedruckten Vulgarübersetzung der *summa Pisana* von *Giov. delle Celle II c. 39*, aus der 2. Hälfte des 14 Jahrh's. Seeversicherung in Cypern 1373 bei *Amadi* . . . (*Bensa,* in Ehrenzweig's Assekuranzjahrb. VII, 3 S. 4). 1395 ist die Assekuranz in Florenz allgemein üblich: *sicut est consuetudo mercantium.*"

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[730] Bensa, App., *Documents,* iii, pp. 192–193. "In nomine D. Amen. Ego Georgius Lecavellum civis Janue confiteor tibi Bartholomeo Basso filio Bartholomei me habuisse et recepisse a te mutuo gratis et amore libras centum septem Janue. Renuncians exceptioni dicte pecunie ex dicta causa non habite, non recepte, non numerate et omni juri. Quas libras centum septem Janue, vel totidem eiusdem monete pro ipsis, convenio et promitto tibi solemni stipulatione reddere et restituere tibi aut tuo certo nuncio per me vel meum nuncium. Usque ad menses sex proxime venturos, salvo et reservato, et hoc sane intellecto, quod si cocha tua de duabus copertis et una timono, vocata S. Clara que nunc est in portu Janue parata, Deo dante, ire et navigare presentialiter ad Majorichas, iverit et navigaverit recto viagio de portu Janue navigando usque ad Majorichas et ibi applicuerit sana et salva, quod tunc et eo casu sit presens instrumentum cassum et nullius valoris ut si facta non fuisset. Suscipiens in me omnem risicum et periculum dicte quantitatis pecunie quousque dicta cocha aplicuerit Majoricis, navigante recto viagio ut supra. Et etiam si dicta cocha fuerit sana et salva in alique parte, usque ad dictos sex menses, sit similiter presens instrumentum cassum et nullius valoris ac si factum non fuisset. In dictum modum et sub dictis conditionibus promitto tibi dictam solutionem facere, alioquin penam dupli dicte quantitatis pecunie tibi stipulanti dare et solvere promitto cum restitutione damnorum et expensarum que propterea fierent vel sustinerentur litis vel extra, ratis manentibus supradictis et sub ypotheca et obligatione bonorum meorum, habitorum vel habendorum. Actum Janue in Banchis in angulo domus Carli et Bonifaci Ususmaris fratrum, anno dom. nat. MCCCXXXXVII indit. XV secundum cursum Janue, die XXIII Octobris circa vesperas. Testes Nicolaus de Tacio draperius et Johannes de Recho filius Bonanati cives Janue."

[731] Bensa, p. 59.

[732] Goldschmidt, p. 364.

[733] Above, p. 236.

Now in order for insurance to emerge from the maritime loan it was necessary to accomplish two things: one was that the contract should be freed from such credit transactions as loans, exchanges, and *commendas;* and the other was that the insured should be absolutely bound to pay the premium,[738] or that he should prepay it.[739] The separation from the credit business was aided by the general prohibition of the Church against interest, which was extended during the years 1227 to 1235 only, even against maritime interest.[740] But the Church had never prohibited the assumption of risk, and so it seemed plainly indicated to separate the one from the other and to erect it into an independent contract, whatever the means.[741] Whether or not the Church was convinced by this change, or was willing to be convinced, one cannot say. The Church may have learned wisdom since the prohibition of maritime interest in the previous century, or it may have read the writing on the wall, and, weakened and divided by the Great Schism then in progress, have let the matter rest. Certainly some Church opinion was distinctly against insurance because of its analogy to the maritime loan. The theologian Franco Sachetti, writing in 1370, just one year after the decree of the Genoese Doge of which we shall immediately speak, distrusts insurance "because no one save God can insure anything in this life." [742] Nevertheless, the Church as such took no official action against insurance. The situation was, however, a very doubtful one, according to the best commercial and legal opinion of the time, and the merchants felt disquieted. As a matter of course, every contract carried a waiver of a legally technical appeal to the courts, but this did not seem to be enough, and the various commercial cities passed statutes to prevent an appeal to the canon law, expressly prohibiting the invocation of the exception of usury against insurance policies.[743] It is a striking testimony to the early spread and to the great importance of insurance that one finds the first statute in favor of the contract only twenty-two years after the first policy that we possess. It was made at Genoa on October 22, 1369, by the Doge Gabriele Adorno, and provided heavy fines against those who should allege the exception of usury in order to bring the case before an ecclesiastical court, because "through impediments of this sort, instruments of exchange and other contracts of merchants . . . could not be ordered to be executed." [744] It was probably a similar fear that led

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[734] Lefort's French Introd. to Bensa, p. xi. "Au début, pour la rédaction du contrat d'assurance, ce fut vraisemblablement le contrat d'affrétement qui servit de modèle . . . Enfin, il était natural de voir les personnes chargées à la fois de dresser les actes relatifs à l'affrétement et de rédiger les polices d'assurance, introduire les dispositions dont elles avaient une connaissance parfaite et dont peut-être, comme tous ceux confinés dans leur spécialité, elles s'exagéraient l'importance ou la valeur."

[735] From *polliceor,* "I promise."

[736] Lefort's Introd., p. xii.

[737] Pedro Santerna refutes various authors who had held insurance contracts void on the ground of usury; see Holdsworth, *H.E.L.,* VIII, p. 274 n. 5.

[738] It is quite possible that it is to this that the Florentine statute of 1301 (cited above, p. 243, n. 727) may refer, but the date seems too early according to our present knowledge.

[739] Goldschmidt, p. 363.

[740] *Ib.,* p. 363.

[741] *Ib.,* pp. 363–364.

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[742] Goldschmidt, pp. 363–364, n. 93. "Wenn der Theologe *Franco Sacchetti* . . . die Assekuranz miszbilligt, weil darin ein unstatthaftes Misztrauen in die göttliche Vorschung liege: *però che altro che Dio non può sicurare niuna cosa in questa vita.*"

[743] *Ib.*, pp. 373, 378.

[744] Bensa, *Statutes,* App. i, pp. 149–151. The statute runs, "Advertentes et considerantes quod homines debitores, eorum creditoribus propter eorum malitiam multotiens in solutionibus debitorum fiendis satisfacere nolentes, multa obstacula et impedimenta inferunt, et maxime allegantes quod contractus sive mutuum, de quo ageretur et pro quo molestarentur, esset illicitum et feneratitium, et quod secundum scripturas, canonice non possit ipsio talis contractus requiri vel peti; et super hoc habent recursum, et habuerunt temporibus retrohactis, ad curias et magistratus ecclesiasticos pro dilationibus et morosis anfractibus inferendis. Statuerunt et decreverunt et ordinaverunt, quod si aliquis persona cuiuscumque conditionis existat que per instrumentum se obligaverit . . . cum scriptura vel sine . . . et allegaret quod contractus ille esset usurarius vel illicitus, propter quod recursum haberent ad Vicarium D. Archiepiscopi vel alium magistratum civitatis seu districtus, ecclesiasticum vel secularem . . . ex eo quod diceretur et allegaretur per dictum debitorem vel alium nomine ipsius dictum contractum fore illicitum et usurarium seu factum contra canonicas sanctiones. Considerantes quod si per huius modi impedimenta instrumenta cambii et alii contractus mercantiarum, facti, cum scriptura vel sine, non possent executioni mandari, verteretur in magnum dampnum et incomodum civium et mercatorum Januensium, qui comuniter similes contractus faciunt; nec aliter possunt mercimonia exerceri nec navigia navigantia expediri; sit et esse intelligatur ipso jure condemna ipsa talis persona, que contra predicta instrumenta et contractus quos-

Barcelona to insist upon the duty of subjecting all questions of insurance to the Consuls of the Sea. At Genoa and at Florence competency over insurance was given to the commercial magistrates at an early period, although this did not come to pass in Venice until 1468, as we shall see later.

During all this period the contract of insurance steadily developed. We have shown how the first policy that we have, of 1347, is in the form of a fictitious maritime loan.[745] But in about twenty years another change took place, and, after 1368, all the Genoese documents take the appearance of a fictitious sale.[746] A few years later we find the Genoese lawyer Bosco, who wrote between 1390 and 1425,[747] explaining the contract of insurance in accord with the principles of the contract of sale. Under this legal theory of the contract of insurance the property insured was sold by the insured to the insurer, with a condition subsequent of nullity in case of its safe arrival. The sale took legal effect from the moment of the making of the contract of insurance, and therefore the insured property was at the risk of the insurer from the commencement of the voyage. If the goods were captured it was the insurer, and not the insured, who had the right to sue for them.[748] In case of loss the insured was paid the sum for which he had contracted, but when he was paid his insurance (and this consequence of the theory of sale is law today), he had to abandon all his rights in his property to the insurer, and not only was this the legal opinion of Bosco,[749] but it was also the holding

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cumque factos super mercantiis predictis, allegarent dictam exceptionem ut supra, in solidos decem Januinorum pro qualibet libra totius quantitatis pro qua denegaretur solutio, que pena applicetur et applicata esse intelligatur vigore presentis decreti, operi portus et moduli."

[745] Above, p. 243.

[746] Bensa, p. 60. See also *ib., Documents,* appendices viii, of 1370, p. 200; ix, of 1370, pp. 201–202; xvi, of 1425, pp. 223–224; xix, of 1427, pp. 228–229 (life insurance on a wife in childbirth).

[747] *Ib.,* p. 60, n. 2, also giving a list of Bosco's *Consilia* on insurance.

[748] Bosco, *Consilia,* 391, p. 612. "Si contingat res illas super quibus est facta securitas capi, dictæ res tamquam effectæ assecuratorum pro parte qua assecuraverunt super ipsis, per eos vindicantur et recuperantur, et de ipsis tamquam propriis disponunt, quasi tamquam res venditæ ex die contractæ assecurationis toto viagio fuerint ipsorum emptorum et assecuratorum periculo."

[749] *Ib.,* 369, p. 570. "Si contigerit res vel merces, super quibus facta est assecuratio, perdi, assecurator solvit pretium et valorem pro quo assecuravit, et recuperat merces quæ sunt suo periculo a se emptæ, si recuperari possunt, propter quod modus faciendi istas securitates inventus est per viam venditionis sub conditione resolvendæ."

of a case decided in Bruges in 1459.[750] To this principle there were naturally attached legal and logical corollaries. Since a man could not sell what he did not own, it followed that he must have a real interest in the property insured, which was originally required to extend to actual ownership. The contract, therefore, assumed a proper economic function in being a true contract of indemnity, and it was not thus aleatory, a wager on the safe arrival of the cargo or the ship,[751] the two chief subjects of the earliest contracts. It also became possible to insure interests other than these two.[752] It was a principle, even at this time, that insurance should not be a matter of profit to the owner of the property at risk, but that it should be a matter of indemnity only, and that, further, insurance should not be effected for the benefit of anyone except the true owner. Because of this it was customary to add a stipulation to the effect that the insurance was made for the account of the owner.[753] But, as everyone knows, there are many legal interests in a thing that are not included within the category of absolute ownership, and this loophole would sometimes have permitted dishonest brokers to avoid their just obligations. And so, in the course of time, partially [754] to eliminate these exceptions as regards lack of interest, clauses were devised to compel the insurers to pay their debts, whether or not the insured had any interest, such as *habeat vel non habeat, participet vel non participet,* or more briefly, *habeat vel non.*[755] Finally, in order to make a clause to cover any exception as to lack of interest, the following was introduced: *protestans quod in prædictis non participet, sed hæc fieri facit pro sua electione, cautela, cautione et jhuvimento* (interest).[756] But the use of such clauses promptly led to aleatory contracts by people who had no interest whatever in the ships and cargoes that they insured,[757] and M. Bensa devotes part of his sixth chapter to reciting the many legislative efforts to prevent the serious evil[758] of the use of insurance for gambling purposes,[759] efforts which continued into the late XV Century with but moderate success.

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[750] Goldschmidt, p. 377, n. 130. "Que selon la coutume entretenue en matière d'assurance, ledit Marc (the insured) estoit tenu à céder et transporter ausdis asseureurs defendeurs (before payment) tout le droit qu'il avoit es marchandises chargiez en son nom en ladite neif pour les dis deffendeurs en estre recouvre ce qui en est ou pourroit estre salve et peschie."

[751] Bensa, p. 65.

[752] *Ib.*, p. 66.

[753] Bensa, p. 69.

[754] Goldschmidt, pp. 370–371, n. 114, believes that they refer to the new conception of an insurable interest, as distinct from strict legal ownership. "Bereits im Beginn des 15. Jahrh.'s (*Bensa, doc. 16. 17. 24,* aus den Jahren 1425–1433) finden sich die Klauseln *habet vel non* (habeat), *participet vel non participet,* welche schwerlich, wie *Bensa* meint, nur die Anfechtung wegen mangelnden Eigenthumsinteresses verhindern wollen, dagegen den Nachweis eines anderweitigen Interesses erfordern."

[755] Bensa, p. 66.

[756] *Ib.*, pp. 66–67.

The contemporaneous opinion of Bosco, that the broad and ample tenor of the contract was necessary in order to avoid an ancient as well as a modern difficulty, the quibbling of insurers[760] when faced with a demand for payment arising out of an insured loss, seems to be correct, but it also had another and much more important justification, since it was connected with the idea of the "insurable interest," a concept then, just as today, of the truest insurance. Like most of the institutions of this period, it was created as the result of a commercial need to safeguard economic interests, and hence was legally recognized.[761] And it was this idea that undoubtedly lay behind the relaxation of the originally strict regulation in regard to ownership of insured property whose gradual enlargement we have just examined. Here we may once again behold a quite modern idea already in a flourishing condition.

It is not necessary to say that in the XIV Century insurance grew and flourished. We have already seen that at the beginning of the century prominent merchants considered it part of the ordinary expense of doing business, and that there always appears to have been a general and common belief in its utility, strong enough to alter it into accordance with changed needs. Genoa was the most active seat of the business of insurance.[762] Many Tuscans engaged in the business in the interest of their Florentine correspondents, and so also did the Catalans, through whom insurance came to Spain.[763] As early as 1370 we find a Genoese writing insurance policies in Bruges.[764] In Genoa there arose societies of insurance brokers who were employed in this business alone,[765] and, if well managed, their business ought to have flourished, for we have the record of one Genoese notary who drew up more than eighty contracts within three weeks, in 1393.[766] Yet that the business had its hazards is witnessed by Bosco,[767] and, despite all the practical knowledge in the world, this was bound to be so when no statistical records were kept as to mathematical probabilities.[768] As the contract of insurance grew in general usage its form tended to become less disguised, and little by little its appearance became separate from the maritime loan or from the contract of sale, for its legality was recognized and enforced by municipal law. We find a policy which fixes the premium and frankly states it as the consideration for assuming the risk.[769] This was a new departure. Shipowners had apparently ceased to act as insurers, and had been driven to the wall by the brokers. In consequence of the size of the sums insured, it became customary for many persons to join in the assumption of the risk, writing under the policy the sum that they were prepared to insure and signing their names.[770] As a consequence, and before the end of the XIV Century, we meet with reinsurance,[771] and even with insurance against the risk of the insolvency of the insurer.[772]

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[757] Bensa, p. 67.

[758] *Ib.*, pp. 123–127; 138. Disagreeing with Vivante's opinion that the growth of the contract of insurance was due to the use made of it in betting, Bensa urges the general commercial belief in its utility: "Niun dubbio che le scommesse avranno contribuito ad accrescerne il numero, ma dopoché il contratto giá aveva raggiunto larghissima diffusione fondata sulla persuasione della sua utilitá."

[759] Goldschmidt, pp. 370–371. "Aber von vorneherein lag auch der Miszbrauch nahe, unter dem Namen 'Assekuranz' Wetten, d. h. 'Wettassekuranzen' ohne versicherbares Interesse zu schlieszen, wie das schon längst beim Seedarlehen und ähnlichen Verträgen unter der Aegide der 'Vertragsfreiheit' üblich, ja hin und wieder sogar gesetzlich gestattet war. Mindestens die ältere juristische Theorie nahm hieran keinen Anstosz."

[760] Bosco, *Consilia*, 392, p. 611. "Nisi instrumenta assecurationum essent ita lati et ita ampli tenoris, fatui essent facientes se assecurari quia assecuratores propter non solvere mille cavillationes excogitarent."

[761] Goldschmidt, p. 370.

[762] Bensa, pp. 80–81.

At the beginning of the century, when insurance went in disguise, there was no rule as to the form of the contract. Writing was general,[773] but it was certainly not obligatory, and contracts of insurance could be made verbally.[774] But there were legal advantages in having the contract set down in writing by a notary, and hence this was the usual case.[775] Such contracts required no legal determination by a court, but had executive force in themselves.[776] Later, privately drawn insurance contracts also enjoyed this privilege. They were usually drawn up informally by the notary and only notes were taken of the clauses necessary to be inserted in the contract.[777] In the ordinary case these notes would never be made up into a formal document, but only where it was necessary to enforce it by legal means.[778] However, the general employment of these brokers would naturally lead to the development of a standardized form, and, as we have seen, since these were the same brokers who had previously drawn up the maritime loans and the contracts of affreightment, it was to be expected that they would carry over into the new contract many of the old contract's provisions, of which, says Lefort, like all those confined within their specialties, they may have overestimated the importance or the value.[779] A little later on we find the insurance brokers assembled in companies and connected with the large banking houses,[780] and this cannot but have helped to influence the development of the law, too, though one must always bear in mind the continuing and very real influence of the customs and needs of the merchants themselves;[781] for these contracts of insurance represent, in the main, their written usages.[782] But the form which had been evolved in Florence by the closing years of the XIV Century was in remarkable conformity to the modern system,[783] as well as to that commented on by Straccha[784] in the XVI Century. Its similarity to the English contract of the XVII Century, given below,[785] is at once apparent, and no great difference will be found between either one and one of the middle of the XIX Century.[786] In a word, for five centuries there has been no material alteration in maritime insurance policies,[787] but only an expansion. The Italian form of the end of the XIV Century was officially adopted by many governments in the XVI Century, partly for fiscal reasons, and partly because of its generally accepted uniformity.[788] There were doubtless slight variations. The Florentine and Pisan policies contain phrases which those of the early Genoese policies that we have lack, but other Genoese policies may have had them; those drawn up by the merchants may have differed from those drawn up by the notaries.[789] None the less, there was striking uniformity. We will give for comparison first of all the provisions as to risks covered of a Pisan policy of 1385,[790] which, it will be noted, is like the later Florentine policy of 1397,[791] though not so completely developed. How modern a translation of the policy sounds![792]

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[763] Bensa, p. 81.

[764] *Ib.*, pp. 49–50.

[765] *Ib.*, p. 80.

[766] *Ib.*, p. 79.

[767] Bosco, *Consilia*, 369, p. 570. "Marcus propter lucrari fecit plures assecurationes sicut faciunt plurimi mercatores de Janua quorum aliqui de nullo alio vivunt quam de huiusmodi quæstu, qui quandoque est utilissimus, quandoque damnosus, secundum discretiones assecurantium et secundum cursum temporum et fortunæ blandimenta vel adversiones."

[768] Bensa, p. 80. Goldschmidt, p. 367.

[769] Bensa, p. 52. "Una contrattazione esclusiva sul rischio colla fissazione del premio: '*per lo rischio di detti danari a ragione di lire otto, soldi quindici centinaio.*'"

[770] *Ib.*, p. 55.

[771] Goldschmidt, pp. 368–369.

[772] Bensa, p. 76. Goldschmidt, p. 369.

[773] Goldschmidt, p. 374, n. 121.

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[774] Bensa, p. 65. "I documenti non lasciano dubbio sulla possibilitá di contrarre l'assicurazione *cum scriptura vel sine.*"

[775] *Ib.*, p. 62.

[776] Goldschmidt, p. 378.

[777] Bensa, p. 63. An example of 1426 is given in his App., *Documents,* xvii, p. 225.

[778] *Ib.*, p. 63.

[779] Lefort, Fr. Introd. to Bensa, p. xi.

[780] Goldschmidt, p. 362. "Im Jahre 1434 begegnen in Genua sieben Versicherungsmäkler (*censarii securitatum*), zum Theil als grosze Bankhäuser (*bancherii*) im Kompagniegeschäft."

[781] Mitchell, p. 155.

[782] *Ib.*, p. 151.

[783] Bensa, pp. 64–65. "La formola delle polizze d'assicurazione citate era, del resto, come puó vedersi dagli esempi arrecatine, assai conforme al sistema moderno, ed in alcuni punti affatto simile al modulo comentato dallo Stracca, del quale conviene avvertire, essere derivato per l'appunto da quello in uso in Firenze. Né forse é da rigettarsi la congettura che anche in Genova le polizze d'assicurazione contenessero quei piú minuti particolari e clausole che si leggono nelle polizze fiorentina e pisana, e non si riscontrano negli istrumenti genovesi."

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[784] Straccha, *De Assecuratione,* gl. V, n. 5, p. 24, cited in Bensa, p. 64. The form considered is dated 1567.

[785] In Appendix III.

[786] Park, *Marine Insurance,* 8th ed., pp. 989–990.

[787] Goldschmidt, p. 375. "Die Seeversicherungspolizen bereits der letzten Dezennien des 14. Jahrhunderts unterscheiden sich nicht erheblich von den noch in der Gegenwart üblichen, wie grosz auch die Zahl der noch unerledigten Rechtspunkte war. So wurde die Versicherung nicht allein gegen eigentliche Seegefahr, sondern gegen alle mit der Seefahrt verbundenen Unfälle genommen." Also Park, *Marine Insur.* 8th ed., I, p. 15. "The form of a policy now used in *London,* is nearly the same which was adopted two hundred years ago, as may be collected from Malyne [108; 3 Burr. 1555]."

[788] Holdsworth, *H.E.L.,* VIII, p. 279 and n. 7 thereat, citing two forms of policy prescribed at Florence in 1523 and given in Magens, *Insurances,* II, pp. 4–7.

[789] Above, p. 251, n. 779.

[790] Bensa, App., *Documents,* xi, p. 210: "Corrono i detti assicuratori ogni risico dal detto luogo al detto luogo e sopra le dette robe—che fossono caricate—e per le stime iscritti disotto, e in detto navilio—di Dio e di mare e di gente e ogni caso e pericolo e fortuna e disastro o caso sinistro che per niuno modo potesse intervenire."

[791] *Ib.,* App., *Documents,* xiv, pp. 217–218. "E il rischio che gli assicuratori corrono in sulla detta roba, carica, o si dee caricare in sulla detta nave, si è dall ora che la detta nave farà vela—da Mutrone per andare in Aqua morta; si é di Dio, di mare, di gente, di fuoco, di gitto di mare; di ritenimento di signori o di Comuni, o d'olcun'altra persona, o di rappresaglia o d'arresto e d'ogni altro caso, pericolo, fortuna, impedimento o caso sinistro, che per verun modo ne potesse intervenire o fusse intervenuto, e fussono fatti i casi come si volessero o di che condizione, salvo di stiva o di dogana."

[792] Bensa, p. 134. "Le principali clausole in uso nelle polizze odierne giá erano

"And the risks which the insurers are content to bear concerning the said goods, shipped, or to be shipped upon the said vessel, from the hour when the said vessel shall set sail to go from Mutrone to Aigues Mortes; they are of God, the sea, nations, fire, and of jettison; of restraint of princes or of peoples or of any other person, of reprisals, of arrest and of every other case, peril, fortune, impediment or mishap, which in any way can happen, or may have happened, no matter how or under what condition the cases occur, excepting ballast and custom-house duties."

Henceforth this form became the stable form of most of Western Europe, and, as we shall see, it was taken over in England, due to the great influence of the foreign merchants, and became the prevailing form there. From this time (1397) forth, "the clauses of the early contracts remain the basis of the modern law of insurance of the civilised world. Policies of marine insurance are to this day made in a form which on the face of it is clumsy, imperfect, and obscure. But the effect of every clause and almost every word has been settled by a series of decisions, and the common form really implies a whole body of judicial rules." [793] The usages of the Italian merchants have crystallized into a universal body of rules, and these rules, as the basis of a long series of interpretations and of judicial decisions, have become a part of the English law, and are accepted in the English courts to this day, as having "a binding and exclusive force." [794]

With this early and full development of the contract of insurance there appear, also, the various provisions that we know today, which

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di stile nel secolo XIV, cosí riguardo ai termini ed alle modalitá del rischio, che alla baratteria, alle franchigie, ecc."

[793] Mitchell, pp. 151–152.

[794] *Lohre* v. *Aitchison*, 3 *Q.B.D.* (1878) 558, 561. *Per* Brett, L. J. "The dispute thus raised is one with regard to the mode of ascertaining the amount of a loss under a policy in ordinary form, and of adjusting that amount when ascertained. Such disputes have for a long period been determined according to recognised rules. As many of the arguments presented to us seemed to trench violently on several of those rules, it appears to us advisable to state our view of the binding force of those rules, and the reasons why they have a binding and exclusive force. They are rules which originated either in decisions of the Courts upon the construction or on the mode of applying the policy, or in customs proved before the Courts so clearly or so often as to have been long recognised by the Courts without further proof. Since those decisions and the recognition of those customs, merchants and underwriters have for many years continued to enter into policies in the same form. According to ordinary principle, then, the later policies must be held to have been entered into upon the basis of those decisions and customs. If so, the rules determined by those decisions and customs are part of the contract. And though a Court now might differ from the correctness of the rules as originally laid down, it must yet now act upon those rules as parts of the contract or as agreed modes of carrying it out."

even then had been ascertained and accurately stated and had become rules of law.

First of all, we have already established the fact that the idea of an insurable interest had been discovered,[795] that the contract was one of true indemnity,[796] and that, on payment, the rights of the insured passed to the insurer, as regards the property lost.[797]

At first the goods insured were carefully described, but eventually this was reserved for certain precious goods and objects, and everything else was described by a general phrase.[798]

The ship on which the property was loaded was described, usually by name,[799] and the names of the captain, the consignor, and the owner were inserted.[800] If only a part of the cargo was to be insured, nevertheless the ship was definitely specified.[801] It was not customary to permit the insured to load *in quovis,* in whatever ship he pleased,[802] except that where it was necessary to transship in transit it was usual to leave the second ship indefinite.[803] Insurance *in quovis* was never allowed in Barcelona [804] but it was common in English policies in the XVI Century.[805] The time and the duration of the risk were carefully specified, too; originally the risk was always for the voyage, and, in Genoa, it lasted from the moment of sailing until disembarcation, as regards cargo,[806] but in the case of the ship it ended when she had been safely anchored for twenty-four hours in the port to which she was bound.[807] Later on in the XIV Century, time policies, not exceeding a year, were introduced.[808] Property could be insured, lost or not lost, if the loss was unknown at the time.[809] In general, the route was prescribed, and deviation, unless expressly permitted,[810] made the contract void.[811] We have just seen how carefully the policy sets forth the risks against which the insurance is made.[812] They included unaccustomed and unforeseeable risks,[813] but certain risks were frequently explicitly excepted [814] from the general and unconditional liability. Among such risks were the barratry of the master,[815] theft,[816] and general average, as well as the special average of wetting of the goods.[817] If goods were captured and ransomed or recaptured the liability of the insurers was disputed,[818] but, by the better opinion, they were liable. Policies sometimes contained special clauses exempting the insurers from this liability, provided that they themselves ransomed the goods and safely delivered them at the journey's end.[819] Sometimes the policy specified a time after which, by a legal fiction, the ship would be presumed lost, if she was not heard from.[820]

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[795] Above, p. 248.

[796] Above, p. 248.

[797] Above, p. 247.

[798] Bensa, p. 68. "Da ultimo la specificazione fu riservata a determinate merci ed agli oggetti preziosi, e tutte le altre merci fuorono comprese sotto la generale denominazione *super rebus et mercibus; sopra robe e mercanzie.*"

[799] Goldschmidt, p. 338.

[800] Bensa, p. 69.

[801] *Ib.,* p. 69.

[802] *Ib.,* pp. 69–70.

[803] *Ib.,* pp. 69–70; 196–197; and Bensa's App., *Documents,* vi, of 1350.

[804] Bensa, p. 106.

[805] *Ib.,* p. 70, on the authority of Straccha, who discusses this clause and declares it to be common in English policies.

[806] *Ib.,* p. 70. Also p. 216, App., *Documents,* xiii, of 1393; and p. 218, App., *Documents,* xiv, of 1397.

[807] *Ib.,* p. 70. Also p. 213, App., *Documents,* xii, of 1393; p. 223, App., *Documents,* xvi, of 1425.

[808] *Ib.,* pp. 70–71.

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[809] Bensa, p. 71.

[810] *Ib.*, p. 224. App., *Documents,* xvi, of 1425, permits deviation. "Veniendo, stando, navigando, onerando, ex exonerando usque in Januam, ubicumque, quocumque, quomoducumque, et qualitercumque, antecedendo et retrocedendo, et per rectum et obliquum, et tam a dextris quam a sinistris et demum navigando prout et sicut voluerit dictus patronus seu alius pro eo, viagium prosequendo."

[811] *Ib.*, p. 71. Deviation was controlled by the phrases "navigante recto viagio" or "eundo et redeundo recto et continuato viagio."

[812] Above, pp. 252–253.

[813] Bensa, pp. 73–74, citing Casaregis, *De Comm. Disc.* I, n. 149.

[814] Bensa, pp. 75–76. For instance, liability was disclaimed if there was trading with the enemy, and on contracts forbidden by the Church to be made with infidels. "A questa generale ed incondizionata obbligazione degli assicuratori si facevano spesso delle limitazioni. Cosí riguardo al rischio dipendente dal viaggio, si notano le clausole proibitive dell' approdo in determinati luoghi, dove il commercio era vietato dal Comune per esser in guerra con esso, o dalla Chiesa trattandosi di paesi di Turchi o di Saraceni: ed oltre a queste v'hanno frequentissime clausole di franchigia da rischi determinati, le quali dimostrano, a nostro avviso, un certo progresso nel razionale ordinamento dell' assicurazione, poiché a queste franchigie dovea certamente corrispondere una proporzionata diminuzione nei premi. Generalmente le franchigie si riferiscono a quella speciale avaria a cui per sua natura la merce poteva piú facilmente andare soggetta, il bagnamento pei tessuti, lo sperdimento per liquidi ecc. Diverse volte peró si riscontra una clausola che nelle assicurazioni di merci non puó altrimenti interpretarsi se non come franchigia da avaria generale: *'non teneantur de damno in corpore navis; non teneantur de devastato corpore navis ad salvamentum tunc existentis.'* "

[815] Bensa, p. 74. Goldschmidt, p. 376, n. 126.

[816] Goldschmidt, p. 376, n. 126.

[817] Bensa, pp. 75–76. See end of note 814 above.

[818] *Ib.*, p. 76.

[819] *Ib.*, pp. 76–77.

The premium, in the earliest period, when the contract of insurance was modelled on the maritime loan, seems to have been paid only after the safe arrival of the ship.[821] But, probably as a result of the fiction of the pretended sale, when the contract of insurance changed its basis, and also because at first there seems to have been no legal method of enforcing payment, the premium was customarily paid in advance. Later, payment of the premium became legally enforceable and the sole duty of the insured was to pay in advance. The contract was annulled if the premium was not paid.[822] If the voyage was abandoned, so that the risk was not incurred, the policy was cancelled and the premium was returned, in which case, however, the underwriter retained ½ of 1 per cent.[823]

Towards the end of the XIV Century we meet with a general theory of insurance in its relation to commerce,[824] which is especially well set forth in Bosco's *Consilia,* to which we have already had occasion to refer. At the same time we also meet with the earliest statutory regulations.[825] The first that we possess comes from Genoa, in 1369, and we have already had occasion to refer to it [826] as prohibiting raising the question of usury before the ecclesiastical courts. The next regulation is also from Genoa and dates before 1383, although its exact text has not survived.[827] It had several provisions, and among them it prohibited insuring foreign ships. This was a result of the faulty economic theories of the period, for it was feared that a considerable part of the public wealth might pass to foreigners in the form of indemnity.[828] Insurance made upon foreign ships was even to be considered as void.[829] But this belief was not confined only to Genoa; a Florentine statute of 1393 prohibited, under severe penalties, insuring any goods or ships not belonging to Florentines.[830]

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[820] Bensa, p. 76. Goldschmidt, p. 377. In Florence, in 1397, it was six months, for a voyage from Mutrone to Aigues Mortes.

[821] Goldschmidt, p. 365.

[822] Bensa, pp. 77–78.

[823] *Ib.*, pp. 78–79.

[824] Goldschmidt, p. 362.

[825] Bensa deals with this in general in Chs. V to VII, pp. 82–127.

[826] Above, p. 246.

[827] Bensa, p. 84. Its substance is gathered from Bosco's comments.

[828] *Ib.*, p. 135. Goldschmidt, p. 378.

[829] *Ib.*, pp. 85–86.

[830] *Ib.*, pp. 153, 86.

The principle was adopted in Spain, at Barcelona, as an echo of the Italian legislation.[831] With the advance of civilization and with a better understanding of economics the situation improved. The Genoese statute referred to above was repealed in 1408 for fiscal reasons,[832] and about 1420 another statute was passed which permitted the making of insurance as well upon the property of foreigners trafficking to and from Genoa, or between Cadiz and the Ocean, as upon that of Genoese, to half its value.[833] As it will be seen, this prohibition cannot have been very effectual and was not long maintained.[834] In the earliest development of this legislation, we find that the laws attempted to cover but a single point at a time, or at most a small field, and in a very practical way. This leads Goldschmidt to doubt, and with reason, Bensa's opinion that at the end of the XIV Century Genoa possessed a general codification of insurance law.[835] But to return to the Genoese statute of about 1383. It also had another provision very characteristic of the period, in declaring void insurance made after the loss was known.[836] We have seen that insurance, lost or not lost, was valid; [837] what, then, was the canon of knowledge in those days of poor communications? Actually, if one single person had heard the news [838] and had brought word. This rule was established in Genoa by statute in 1420.[839] In Barcelona, somewhat later, there was established a legal fiction as to when a presumption of the knowledge of loss would arise. It was reckoned that the news of the loss would travel at the rate of one league per hour from the time of the first actual knowledge of the loss on land.[840] The early laws of Genoa and of Barcelona forbade insuring for the cargo's full value. The proportion allowed to be insured was one-half in Genoa, about 1420,[841] but varied in Barcelona in 1435, depending on the matter of native or foreign ownership. Foreigners could insure to one-half, natives to three-quarters of the value, and bottomry followed the same rules.[842] To demand usurious interest was forbidden,[843] and in Genoa the state imposed a tax as early as 1401.[844] We have already seen that the general form of the contract was later settled by legislation.[845]

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[831] Barcelona statutes of 1435, *ib.*, p. 94; also pp. 119–123.

[832] Bensa, p. 87.

[833] *Ib.*, p. 89, also pp. 159–160, App. *Statutes*, vi, *circa* 1420.

[834] For its modification in Barcelona see *ib.*, pp. 136 *et seqq.*

[835] Goldschmidt, pp. 378–379, and n. 138. "In diesen Entwickelungsgang hat die Gesetzgebung ursprünglich wenig eingegriffen. Die ältesten, noch der zweiten Hälfte des 14. und dem Beginn des 15. Jahrh.'s angehörigen statutarischen Vorschriften haben nur einzelne, überwiegend das wirkliche oder vermeinte öffentliche Interesse betreffende Punkte geregelt. So, auszer der Abschneidung der Wuchereinrede insbesondere: Einschränkung oder gar Untersagung der Versicherung auf fremde Schiffe und wohl auch auf fremde Waaren. Verbot der Kasko— bezw. Waaren-Versicherung zum vollen Werth. Nichtigkeitserklärung der Versicherung, sofern zur Zeit des Vertragsschlusses der Eintritt oder der Ausschlusz des Unfalls erweislich oder doch präsumtiv bekannt war. Dasz Genua bereits im 14. Jahrh. eine vollständige Kodifikation des Versicherungsrechts besessen habe, ist nicht nachzuweisen. Anders *Bensa. p. 82.* ff. aber auf Grund verloren gegangener Gesetze, aus deren erhaltenen Titeln nur erhellt, dasz sie Einzelheiten normirt haben."

[836] *Ib.*, p. 379.

[837] Above, pp. 254–255.

[838] Bensa, pp. 86, 89.

[839] *Ib.*, App. *Statutes*, vi, pp. 159–160. "Et intellegatur in omnibus et singulis casibus antedictis habitam fuisse notitiam, quomodocumque habita fuisset dicta notitia etiam per unam personam solam."

At an early period a summary procedure was provided to enforce the terms of the contracts of insurance, for the jurisdiction over such cases was granted to the commercial or maritime courts [846] as early as 1393.[847] In Genoa, from our earliest knowledge, this jurisdiction lay with the *Ufficio di Mercanzia.*[848] In Barcelona, in the early XV Century, it belonged to the court of the Consuls of the Sea,[849] and in Venice, in the middle of the same century, jurisdiction over insurance was given to the Consuls of the Merchants by a statute of 1468.[850]

But, as we have remarked, none of these early statutes covered very much ground, and, to a considerable extent, they only regulated existing usage and recognized the governing force of the customs of the merchants themselves.[851]

It has already been stated that insurance had penetrated into Spain and especially in Barcelona towards the close of the XIV

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[840] Pardessus, V, p. 514 (Stat. 1458, Ch. 14); pp. 536–537 (Stat. 1484, Ch. 17).

[841] Bensa, pp. 159–160, App. *Statutes,* vi.

[842] Pardessus, V, pp. 495–497. Barcelona, Stat. 1435.

[843] Bensa, pp. 149–151. Goldschmidt, p. 373.

[844] Bensa, pp. 86–87.

[845] Above, p. 252.

[846] Bensa, pp. 111–118.

[847] *Ib.,* p. 153. App. *Statutes,* iii, of 1393.

[848] *Ib.,* p. 113.

[849] Pardessus, V, p. 512 (Stat. 1458, Ch. 9); p. 513, n. 1. "Aucun assuré ne pourra decliner la competence ou juridiction de la dite cour du consulat, ni porter des affaires ailleurs qu'a ladite cour."

[850] Bensa, p. 118.

[851] Mitchell, p. 155.

Century.[852] Not long after the beginning of the XV Century, in 1435, we find, in the comprehensive code of insurance law promulgated at Barcelona, the first complete development of this institution.[853] These laws were finally revised in 1484 and were published in the same book with the Consolato del Mare, thus adding to its importance and themselves gaining a wider circulation through its general use.[854] It will be seen that they were compiled at a later date than much of the Italian legislation, by whose experience they no doubt profited, and whose provisions they would probably have incorporated. The law had now become settled and was ripe for codification.[855] Hence, the influence of the code on European law was great, and it was copied in other countries in the XVI and XVII Centuries.[856]

The code was in the making during some forty-nine years, from 1435 until 1484, and is included within five statutes dated 1435,[857] 1436,[858] 1458,[859] 1461,[860] and 1484,[861] of which the first is the basis of the later laws and the first general statement of insurance law, and of which the last is the final and comprehensive statement, dealing with the various points of insurance law and settling its fundamental principles. The legislation of 1435, the basic legislation, treats of many subjects. It prohibits the insuring of foreign ships,[862] establishes the proportion which the amount of the insurance may bear to the value of the cargo,[863] defines the capacity of the parties,[864] regulates insurance brokers,[865] the contract's form,[866] the payment of the premium,[867] the procedure to enforce the contract,[868] and states the rule governing the presumption of loss.[869] The legislation of 1436 was really enacted to gather up loose threads and made only slight modifications. In 1458 more important modifications and additions were made. Insurers and insured were allowed greater freedom,[870] and additional rules were made to enforce the contract before the Consuls of Sea, no one being permitted to refuse its jurisdiction or to go before another court;[871] additional rules, too, were made as to the payment of the premium,[872] as to the presumption of loss,[873] and as to the cancellation of the policy where the risk was not entered upon.[874] In 1461 it was forbidden to evade the rule prohibiting insurances on foreign ships, by making use of a pretended sale or a loan, like the original disguises under which insurance was developed. In 1484 all the foregoing legislation was summed up definitively in a general code. Liberalism and better economic thought reflected themselves in lifting the prohibition of insurance on foreign ships.[875] Insurance *in quovis* was never permitted in Barcelona because of the fear of gambling and of pretended ownership, and this was carried even further, to the prohibition of insurance on vessels and on merchandise beyond the Straits of Gibraltar, whether for France, England, or the Barbary Coast, unless the destination was Barcelona.[876] In the same spirit, efforts were made to suppress the insurance of non-existent cargoes.[877] The provisions invalidating insurance taken out after the loss was known, actually or presumptively, were strengthened and enlarged.[878] These *Ordinacions sobre les seguretats,* in which the law of insurance received its great definitive statement, were translated into many languages and had a great effect not only on the maritime jurisprudence of the Mediterranean[879] but on France, Flanders, and Brabant, and, finally, on England,[880] whither they spread and were adopted, wholly or in part.

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[852] Bensa, p. 81. Goldschmidt, p. 358, n. 74. Above, p. 240, n. 714.

[853] A summary is to be found in Bensa, pp. 91–109; the text is in Pardessus, V, pp. 493–554. Bensa, pp. 135–136.

[854] Bensa, p. 83.

[855] *Ib.*, pp. 83–84; 91–92.

[856] Holdsworth, *H.E.L.*, VIII, pp. 281–282, citing Magens, *Insurances*, II, pp. 23–49.

[857] Pardessus, V, pp. 493–502.

[858] *Ib.*, pp. 502–504.

[859] *Ib.*, pp. 507–521.

[860] *Ib.*, pp. 521–523.

[861] *Ib.*, pp. 523–543.

[862] §. 1; above p. 256.

[863] §§. 2, 4; above p. 258.

[864] §. 3.

[865] §§. 8, 17–20.

[866] §. 9.

[867] §. 11.

[868] §§. 12–14.

We will, finally, speak briefly of a few of the other aspects of insurance,[881] chiefly in regard to personal risks.[882] Like the later maritime insurance, the policies preserved are drawn in the form of a fictitious sale. The insurer acknowledges the purchase of property from the insured, promising to pay a stated sum for it by a given date (when the risk terminates), subject to the condition of non-payment if an event (the risk) does not happen. Again we meet with the idea of an insurable interest, for an owner could even ininsure himself against loss in case of the death of a female slave in childbirth.[883] In the same way one finds insurance on the life of the insured,[884] on that of a third person,[885] and life insurance against the perils of the sea,[886] although they undoubtedly led to betting. In this connection, one meets with stipulations as to the parts of the world in which the insured may travel. There is also insurance on a wife's life in childbirth,[887] and against death by a limited risk, the plague.[888] In spite of a lack of knowledge of statistical probabilities, to which we have already referred, there was undoubtedly a considerable basis of experience in this particular field, since the Church had been concerned with the matter of annuities for some six or seven centuries previously.[889] We have already mentioned the insurance of land transport in the earliest days of insurance; this continued well into the XV Century.[890] Reinsurance was continuously practised,[891] and insurance was known against a debtor's insolvency [892] and against market fluctuations.[893] In these scattered references we may behold the seeds out of which our present-day marine life, accident, and commercial insurance has grown.

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[869] §. 15.

[870] §. 1.

[871] §§. 8, 9, 18–22; above p. 258.

[872] §. 12; above p. 256.

[873] §. 14; above p. 256.

[874] §§. 14, 15.

[875] §. 1.

[876] §. 2; Bensa, p. 106.

[877] §. 9.

[878] §. 17.

[879] Bensa, p. 104.

[880] Above, p. 240 n. 714. Goldschmidt, pp. 356–368. Bensa, pp. 49–50, 135, 139.

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[881] According to Pedro Santerna, cited by Holdsworth, *H.E.L.*, VIII, p. 296, n. 1, insurance could be made conditional on the happening of all events not illegal or immoral in themselves.

[882] Bensa, p. 129. "Ed in cui puó, sebbene lontanamenti, riconoscersi il germe del moderno contratto d'assicurazione sulla vita."

[883] *Ib.*, pp. 129–130 and App. *Documents,* xxiii, of 1430, pp. 234–235; xxv, of 1467, pp. 237–238.

[884] *Ib.*, pp. 131–132, and App. *Documents,* xx, of 1427, p. 230.

[885] *Ib.*, App. *Documents,* xxii, of 1428, pp. 232–233.

[886] Goldschmidt, p. 382.

[887] Bensa, pp. 129–130, and App. *Documents,* xix, pp. 228–229, of 1427.

[888] *Ib.*, p. 132.

[889] Goldschmidt, p. 382, citing Pertile, IV, pp. 536 *et seqq.*

[890] *Ib.*, p. 381, n. 144. "Der Genueser Societätsvertrag 1424 . . . umfaszt auch die Landversicherungen."

[891] Above p. 250. Goldschmidt, pp. 369, 381.

[892] Above, p. 250. Goldschmidt, p. 369.

[893] Goldschmidt, p. 381.

CHAPTER IV

EARLY ENGLISH MARITIME LAW

In this chapter we shall speak of the early days of the English law maritime and we shall carry the development of that law up to the commencement of the XVI Century. We have chosen this terminus for several reasons. The first and larger reason is international. It was in the XVI Century that the results of the discoveries in the New World began to be felt in the redistribution of mediæval trade along new routes. The overland routes began to decline, and transport on the sea received a new and a greater impetus. As never before, commerce took to the water, and voyages of commerce and of discovery were undertaken to the most distant parts of the globe. The old mercantile society underwent a metamorphosis, the Middle Ages came to an end, and the modern era began. The field of commerce was greatly extended; with improved communications transactions were more rapid and larger sums of money were involved. Commerce now became thoroughly maritime and most truly international.[1] At the same time, the direct and hardly changed ancestors of the modern courts of commerce were being erected on the Continent, and the special law of the merchants definitely was incorporated into, and became part of it, the general and ordinary law of the state.[2] And, finally, although commerce had become truly international, the world had now ceased to be so; that great tradition of the unity of the Roman Empire was broken forever by the rise of the national states; the dream of the *res publica Christiana* was to be destroyed, perhaps forever, by the Reformation and by the consequent wars of religion.

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[1] Morel, p. 188. "Vers le milieu du XVI^e siècle, on commença à s'apercevoir en France que, d'une façon générale, les institutions judiciaires ne répondaient plus aux besoins du commerce. A la suite des grandes découvertes scientifiques et industrielles, de l'invention de la boussole, de l'exploration du Nouveau Monde, la vieille société mercantile s'était métamorphosée. Le champ des transactions avait pris une extension considérable. Tandis qu'autrefois les pays voisins seuls échangeaient leurs produits, les matières premières et les objets manufacturés de l'univers entier paraissaient maintenant sur les marchés de la France, mieux placée au point de vue géographique que n'importe quelle nation, pour recueiller les profits de la révolution qui s'était opérée dans le trafic. Terrestre et presque limité aux frontières à l'époque des foires de Champagne, le commerce était devenu surtout maritime et international. Les transactions étaient plus rapides; elles portaient sur de plus gros chiffres. Bref l'allure des affaires avait changé et, avec elle, les conditions necessaires à leur prospérité."

[2] Holdsworth, *H.E.L.*, V., p. 86.

Insular as England still was, these world changes could not but find their reflection in her life. The Wars of the Roses were over and Henry VII, Henry VIII, and Elizabeth brought prosperity, tranquillity, and firm government to England. Nationhood had been achieved and was reflected in the final victory of the native merchants over the foreign ones, as shown most typically in the ultimate deprivation of the Teutonic Hansa of all its privileges, of which we shall possibly speak some day in another volume. English trade passed into English hands, and it therefore became necessary that the English law should grow *pari passu,* because, as we shall see, the law of commerce had never been administered in the English courts in any considerable way until the XVI Century, when it was brought within the jurisdiction of the newly reorganized Court of Admiralty, and when it received the universal Continental doctrines of the commercial and maritime laws.[3] This reorganization of the court, coinciding as it approximately does with the other events which we have set forth above, appropriately marks the end of this and the following chapter.

It is, of course, impossible to place the date of the reorganization precisely, but one may say that it took place during the early part of the XVI Century. The Trinity House was incorporated in 1516 and the dockyard at Deptford was established at the same period.[4] In 1516 legislation dealing with the criminal jurisdiction of the Admiralty was first attempted, although it was not enacted until 1536.[5] The records of the Court of Admiralty commence in 1524, and its revival dates from this period. To the Court of Admiralty were sent for trial the cases of piracy which, by special treaties made between England and France in 1509, 1518, and 1519,[6] were to be speedily and informally tried.[7] In 1525 we have the Admiral's patent of Henry, Duke of Richmond, containing a wide grant of maritime jurisdiction together with a *non obstante* clause as regards all previous statutes.[8]

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[3] *Ib.,* V., p. 102.

[4] *Select Pleas Ct. Adm.,* I, p. lvii.

[5] Stat. 28 Hen. VIII, c. 15.

[6] Rymer, *Fœdera,* March 20, 1509; Oct. 4, 1518; May 29, 1519.

[7] See above pp. 193, 195. It is provided in the already venerable phrases that procedure shall be "summarie et de plano, sine strepitu et figura judicii . . . sola facti veritate inspecta."

[8] *Select Pleas Ct. Adm.,* I, p. lviii.

In 1540 the admiral was given further jurisdiction to try summarily matters of freight and damage to cargo caused by the negligence of mariners, a statute apparently passed with a view of attracting business to his court.[9] Since it seems to be difficult to choose among these various dates we have arbitrarily chosen the year 1500 for the close of this and the following chapter, which brings them into uniformity with Chapters II and III.

At the beginning of our period we find that, as usual, origins are obscure and sometimes apocryphal. It hardly needs to be said that the thread of the historical and legal continuity of the law which we have so carefully traced in the Mediterranean was early broken in Britain, just as was that of the Christian religion. In spite of King Alfred, the Saxons were not a seafaring people, and one can only smile at Prynne's assertion that "our ancient Saxon kings Alfred, Edgar, Ethelred and others . . . had the dominion of the British ocean." [10] Nevertheless, it seems likely that the first record of the English *claim* to sea power is to be found in the X Century, when Edgar the Peaceful, probably in imitation of the titles of the Emperors at Constantinople, styled himself King of Kings, Sovereign of the Britannic Ocean.[11] In the XI Century we find Edward the Confessor legislating, presumably ineffectively, against the feudal right to wreckage,[12] a subject of which we have already written and of which we shall soon hear much more. William the Conqueror reëdited the laws of Edward [13] in 1070 and in his Chapter XXXVIII we find him defining the circumstances under which jettison is permissible, in which case contribution takes place, but if the jettison was not necessary the person responsible for it is liable to the owner of the goods.[14] Such are the earliest fragments of testimony that remain to us, and they are interesting rather than important. The XII Century, so rich elsewhere in the development of maritime law, seems to have left us not a trace in England, for the theory of the origin of the Rolls of Oléron under English auspices does not seem to be supported by the better opinion.[15] Nevertheless, the Rolls were received in England at an early date, probably at the end of the XII Century, for we find an addition being made to them in the first year of the XIII Century. This is Article XXXV, one of the eleven supplementary articles,[16] and it was made by King John on March 30, 1201.[17] It compels all ships to lower their sails to the king's ships, if required. In the later years of this century we find other developments, so that one can say that the indigenous roots of the English maritime law run back to the XIII Century.

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[9] 32 Hen. VIII, c. 14.

[10] Prynne's *Animadversions*, p. 106.

[11] Cussy, I, p. 8. See the *Libell of Englishe Policye*, 1436, ed. Wilh. Hertzberg, 11, 914–979, which amusingly claims that Edgar possessed no less than 3,600 ships!

[12] Wilkins, *Leges Angl. Sax.*, p. 104.

[13] Desjardins, p. 29.

[14] Pardessus, IV, p. 203. "Jo jettai vos chosez de la nef par pour [*peur*] de mort, et de ço ne me poez emplaider; kar leist [*il est permis*] à faire damage à altre, par pour de mort, quand perile ne pot eschaper. E si de ço me mescez [*je suis soupçonné*] que par pour de mort ne l'faisse, de ço m'espiorai [*je me justifierai*]. E les choses qui sont remise en la nef seint départis en commune selon les chatels. Et si alcun jothed [*jette*] les chatels fors de la nef senz buzun, si l'rendet." And cf. *Black Bk. of Adm.*, II, p. ix.

On the other hand, we must not look for very much or we shall be disappointed. All the evidence that we do possess, as well as the absence of all the evidence that we ought to possess, goes to show that the early maritime commerce of England was comparatively insignificant.[18] It was chiefly confined to the Channel and to short coasting voyages, while the traffic to and from the Continent at this period came overland to the Channel ports. Even in the XIV and XV Centuries, when commerce was expanding, the backwardness of English commerce, no less than the policy of the English kings, contrived to keep most of it in the hands of foreigners,[19] who employed their own ships.[20] It is not surprising, therefore, that the English marine should not have been large or important, and if there was no true Court of Admiralty in the XIII Century it seems to have been because there was no great need for one.[21] Right up to the end of the period covered in this chapter the jurisdiction of the Court of Admiralty seems always to have been very limited. Practically every maritime case of which we have a record, no matter what the court in which we find it, up to the reorganization of the Admiralty Court in the early XVI Century, may be included under the five heads of Piracy, Spoil, Reprisals, Wreck, and Admiral's Droits, and we venture to say that these classifications would include 95 per cent of all the cases. A large majority of all the cases are concerned with Piracy, Spoil, and Reprisals, all cognate subjects.[22] Subjects such as we have treated of in our previous chapters, for instance, Mariners' Wages, Average and Contribution, Contracts, Partnership, and Commercial Paper, are almost or quite unknown. We shall see that the Court of Admiralty was originally instituted to deal with piracy and spoil cases [23] and that a more general maritime jurisdiction did not appear until the end of the XIV Century.[24] But, as we have just said, even this more general jurisdiction was most narrow and was not maintained for long. The conclusion seems to us to be obvious, that in no sense was the early Court of Admiralty a court of commerce and that even in maritime matters its jurisdiction was not complete. This general situation appears to have been noticed by other authors who have not, however, generally come to the logical conclusion necessary. Marsden writes, "It is evident that for some reason which does not clearly appear the navy and the Admiral's Court was [sic] attracting particular attention at the beginning of the 16th century. . . . That some important changes must have taken place in the working of the Court about this period is evident from the very great increase in the business transacted during the first ten or twenty years after the commencement of the records." [25] The explanation of this is plain: that at the beginning of the XVI Century the Court of Admiralty must have been given a full commercial and maritime jurisdiction for the first time, one that it had never possessed until that time.[26]

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[15] Above, pp. 63–64.

[16] Above, p. 67.

[17] *Black Bk. of Adm.*, I, p. 129, n. 3.

[18] At a little later period, 1318–1323, Marsden, *Law and Customs of the Sea,* I, p. xii, writes, "The importance and extent of [the wine] trade is illustrated by a very full account of the wines brought to London . . . in one year 8005 tuns were landed, almost all carried in English ships." On analysis these figures do not seem impressive. Columbus's small ship was of 230 tons burden, when laden; Henry V had large ships of nearly 1000 tons and many of 420–520 tons: XXIV *Encyc. Brit.*, p. 866. Vessels carrying 800 tons of merchandise were apparently not rare in the middle of the XIII Century. Heyd, I, p. 324. Then, when we remember that a ship could easily have made two trips in a year, the number of ships involved need not have been very large—forty would be a generous estimate. At this same period, in 1350, 141 ships of all nations brought 13,429 tons of wine from Bordeaux to London; Schanz, *Englische Handelspolitik,* I, p. 298. This gives an average net tonnage per vessel of 90, and indicates that the traffic was carried in quite small vessels.

[19] Holdsworth, *H.E.L.*, V, p. 113. See below, p. 327.

[20] Schanz, I, p. 352. "Das Ueberwiegen der fremden Flagge im englischen Meere war gleichbedeutend mit dem Ueberweigen des fremden Kaufmanns im englischen Verkehr. Der Zusammenhang der Schiffahrtspolitik mit der englischen Handelspolitik liegt somit klar vor Augen."

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[21] Marsden, *Law and Customs of the Sea,* I, p. xiv, in the XV Century.

[22] *Select Pleas Ct. Adm.,* I, lxv.

[23] Below, p. 288. Also *Select Pleas Ct. Adm.,* I, p. xv. "The evidence, drawn mainly from records connected with piracy matters."

[24] *Select Pleas Ct. Adm.,* I, p. lvii. Holdsworth, *H.E.L.,* I, p. 530. "The courts which had jurisdiction in maritime matters were for the most part the courts of seaport towns."

[25] *Ib.,* I, p. lvii. Holdsworth, *H.E.L.,* I, p. 530.

The reasons for this would have been threefold. Firstly, as regards the commercial cases, most of them would never have come before any English court, but before the special courts granted to the foreign merchants by their special charters or treaties, and, as the principal portion of English commerce was in their hands, this would have meant the principal part of the cases. Those few cases that remained would have gone as a matter of convenience to the nearest local court [27] of the fair, market, or borough, rather than to the distant central Courts of Admiralty. In the second place, the English Court of Admiralty was originally primarily a department of state.[28] It had its origin in the attempt to provide a special tribunal, easily amenable to royal influence, in order to settle interminable and dangerous international disputes. The Admiral was a public official, charged with many administrative duties: [29] the oversight of the Royal Navy,[30] the collection of customs,[31] the maintenance of the Statute of the Staple,[32] the conservation of oyster beds,[33] the upkeep of rivers and harbors.[34] Like the *notarius mercanziæ* in Florence, the chief cases to come before him were cases that might have international ramifications. Thirdly, the lesser and ordinary small maritime cases must not have come before him, but before the local courts. On a claim for wages, on the matter of salvage due on a few casks of wine, could the litigants from, say, Lostwithiel or Newcastle, have afforded to travel to London or even to the court of the nearest Admiral in the then state of communications? [35] It seems plain that that could not have been done, and therefore the ordinary maritime cases must have been tried before the local courts.[36] That such must have been the case is further evidenced by the fact that the Admirals endeavored to encroach upon the local jurisdictions towards the close of the XIV Century, and that this encroachment was apparently successfully repelled by statutes.[37] Such, one must infer, is also the opinion of Sir William Holdsworth, who writes, "The courts which had jurisdiction in maritime matters were for the most part the courts of seaport towns." [38] It is to these courts of the seaboard towns that we must first turn our attention.

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[26] In his later *Law and Customs of the Sea* (Navy Records Society, 1915), Marsden writes, "Nor did the Court of Admiralty itself remain anything more than a project for more than a century after it is first heard of." I, p. xiv.

[27] *Select Pleas Ct. Adm.*, II, p. xliii. "The contention of the Admiralty practitioners . . . seems to have been that, in cases where . . . the law merchant or law maritime applied, the Admiralty had exclusive jurisdiction. This does not seem to have been the case where the cause of action arose within the limits of a local court."

[28] Holdsworth, *H.E.L.*, V, p. 125.

[29] Senior, pp. 24, 58.

[30] *Black Bk. of Adm.*, I, pp. 2–5.

[31] *Ib.*, pp. 154–157, 225.

[32] *Ib.*, pp. 156–157, 225.

[33] *Ib.*, pp. 156–159, 225.

[34] *Ib.*, pp. 224, 229.

[35] This was a great source of complaint, even in later days, *Select Pleas Ct. Adm.*, I, p. li.

In the earlier part of the Middle Ages there were many of these towns, and they had jurisdiction both in maritime and in commercial causes.[39] Such was the case at Ipswich,[40] and the *Red Book of Bristol* says that the *Lex Mercatoria* applies to markets and instances ports as among the various sorts of places where markets are held.[41] Pleas of merchants and sailors were tried in the Bristol Courts before 1241,[42] and the maritime court of Yarmouth was in existence before the reign of Edward III.[43] These local courts, then, were like the Continental courts [44] and must have been the archetype for the later

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[36] Holdsworth, *H.E.L.*, I, p. 530.

[37] 13 Rich. II, st. I, c. 5. 15 Rich. II, c. 3.

[38] Holdsworth, *H.E.L.*, I, p. 530.

[39] *Select Pleas Ct. Adm.*, I, p. xiii. "From very early times there had been in existence in some of the seaport towns 'port' or 'marine' courts which, sitting from tide to tide and administering the law maritime to merchants and mariners, had some of the characteristics of the Admiralty Court of later times." See Bateson, I, pp. xx–lv, for a considerable list. Also Raikes and Kilburn, *Adm. Jurisdiction in County Courts,* p. xxix.

[40] *Black Bk. of Adm.*, II, pp. viii, 23.

[41] *The Little Red Book of Bristol,* cap. i. Bickley, I, pp. 57–58.

[42] Bateson, I, p. xx.

[43] Raikes and Kilburn, p. xxx.

[44] There is not a shred of evidence to support the conjecture of Sir Travers Twiss that, *about 1100,* "a Customary Law of the Sea in civil matters was administered to passing mariners in the more important maritime boroughs of England, after the example of the mercantile cities on the shores of the Mediterranean Sea, and that the merchants and mariners of Spain and of France who frequented British ports brought with them many traditions of maritime law, which had been preserved in the Courts of the Sea." *Black Bk. of Adm.*, II, pp. viii–ix. There is no evidence to support such a conjecture even at a somewhat later date. He is, however, a little more accurate when he writes, *ib.*, II, p. xxxvii, "The Domesdays of the English maritime boroughs . . . disclose to us the existence of borough courts in England at a very early period administering a customary Law of the Sea to passing mariners, and the Domesday of Ipswich helps to carry back our knowledge of this practice to a period almost contemporaneous with the reign of Richard I. So far there is unimpeachable evidence that before the Admiral's jurisdiction was established in England, and the decision of questions of contract and tort on

Admiralty Court, since they had cognizance of both commercial and maritime cases. When the Admiral's court was first established, it was only natural that there should be a conflict, and the jurisdictions of these towns were preserved, sometimes by statute,[45] and sometimes by an express grant of Admiralty jurisdiction in their charters, exempting them from the jurisdiction of the Admiral.[46] As a result, most of these courts survived into the XV and XVI Centuries,[47] while that of the Cinque Ports lasted until the XIX Century.[48] Among the places which at various times possessed such a local jurisdiction were the Cinque Ports, probably the first English court in which a law of the sea, distinct from the English common law, was known and applied,[49] London, Bristol, Rochester, Ipswich, whose Domesday is probably the earliest surviving record of any court that sat from tide to tide and administered the maritime law in England,[50] Lostwithiel, Padstow, Yarmouth,[51] Dartmouth, Newcastle, Tynemouth, Scarborough, Chester, King's Lynn, and Harwich.[52] The law that these different courts administered was probably much the same. It has been remarked that "There was more variety between the customs of towns in different parts of Europe than between the customs prevailing in the different seaports." [53] Such was the case in England, and the fundamental basis of this custom was the laws of Oléron, which were widely received in England.[54] They are to be found in the *Liber Memorandorum of the*

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the high seas was assigned to the Admiral's Court, there were Courts in England whose province it was to administer a common Law Marine to foreign equally as to British merchants and mariners." Sir Travers Twiss's conclusion seems to be probable, but the evidence is hardly "unimpeachable," as regards the "common Law Marine." The analogy of the Mediterranean cities makes his conclusion most likely and the acceptance of the Rolls of Oléron is in its favor, but we must regretfully say that we do not possess any other accurate evidence as to the specific and common content of the law in England at this early date.

[45] 13 Rich. II, st. I, c. 5. 15 Rich. II, c. 3. 2 Hen. V, st. I, c. 6. 32 Hen. VIII, c. 14. 5 Eliz., c. 5 §. 42. 27 Eliz., c. 11.

[46] *Select Pleas Ct. Adm.*, I, pp. xiii–xiv; II, pp. xix–xx.

[47] *Ib.*, II, pp. xix–xxi. Holdsworth, *H.E.L.*, V, p. 120.

[48] Holdsworth, *H.E.L.*, I, p. 533.

[49] Marsden, *Law and Customs of the Sea,* I, pp. viii–ix.

[50] *Black Bk. of Adm.*, II, p. viii.

[51] See Raikes and Kilburn, p. xxx.

[52] *Select Pleas Ct. Adm.*, I, pp. xiii–xiv. Holdsworth, *H.E.L.*, I, p. 531.

[53] Holdsworth, *H.E.L.*, V, p. 100.

[54] Senior, p. 20. "There is no doubt that [the laws of Oléron] were the recognized code in matters within their scope in the courts of the boroughs long before those of the admirals came into being." Holdsworth, *H.E.L.*, V, pp. 120, 129. "England based its maritime law also upon the laws of Oléron."

City of London,[55] they are given in the *Little Red Book of Bristol*[56] and in the *Oak Book of Southhampton,*[57] and they were adopted by the Admiralty itself.[58] The procedure of these local courts was assimilated to that of the similar courts on the Continent; it was swift and it was summary[59] and customary law was admitted.[60] At Ipswich the court sat from tide to tide,[61] and we also meet the provision that merchants' pleas should be decided by the third reflowing of the tide.[62] At Padstow and at Lostwithiel similar maritime courts sat by the seashore at tide-time and administered the maritime laws and customs with the aid of a jury of merchants and mariners.[63] The court at Bristol was similar, as is proved by the case of *Pilk v. Venore,* tried before the mayor, bailiffs, prud'hommes, captains, and mariners in 1349: "in plena curia coram maiore et ballivis et aliis probis hominibus villæ et magistris et marinariis." But the plaintiff and the defendant pleaded the "lex et consuetudo de Oleron," and the judgment was certified to the Chancellor as based on it.[64] It was held that the captain of a ship is liable for the loss of cargo by the theft of the crew. The Cinque Ports also possessed very extensive privileges, and they were sufficiently powerful to obtain further privileges or special rulings when they so wished.[65] From the earliest times they were exempt from the Admiralty jurisdiction.[66] Fortunately we happen to know of some of the matters presented at the inquisitions of the Cinque Ports Admiralty in the first half of the XV Century.

X. found anchors and cables at sea "in profundo maris." X. and others "super mare" or "infra portum ville de Wynchelsea" feloniously took or spoiled goods from strangers or Englishmen and the mayor of Faversham failed to arrest such spoilers in obedience to the Admiral's command. X. found a whale or porpoise floating on the sea. X. found barrels of pitch and other goods floating on the sea as wreck. X. found a dead man floating on the sea, and on him some money. X. within the Admiral's jurisdiction assaulted B. and hit him on the head with a stone, against the King's peace. X. and others salved certain goods from a wrecked carack, of which the Admiral's share was 6s. 8d. A ship was lost by the fault of a pilot whose name is not known. X. received spoiled goods in contempt of the Admiral. X. took from the Thames, near London, a ship, which was arrested for the Admiral at Dover, and appraised. X. captured enemies' ships, and the Admiral's share is so much. The Abbot of Canterbury trespassed upon the fishery of the men of Sandwich in the Stour and committed an assault. The mayor and jurats of Rye wrongfully hindered men of Lydd from selling their fish at Rye, and took unfair tolls. A ship was arrested for non-payment of duty; the Admiral's share is not known. X. erected a weir and obstructed the river. X. found wreck below the floodmark and the prior of Canterbury claims it. X. is a forestaller of fish. The Abbot of Fécamp has been taking profits and waifs beyond the port of Winchelsea, without any grant from the King in that behalf. X. sued in the High Court of Admiralty for a trespass committed within the Admiralty of the Ports. X. found certain wreck off Seaford and took it out of the jurisdiction of the Ports. X. assaulted B. below the floodmark. A ship was found at sea "fugitiva," its owners unknown. A wreck has been spoiled. X. is in prison for sailing without letters of safe conduct. X. cut away the buoys from an anchor slipped by a ship in the Downs in a gale of wind. A ship sank in the harbor. X. cast ballast into the harbor. X. took upon himself the office of pilot, and is no seaman.[67]

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[55] *Black Bk. of Adm.,* I, p. lviii; III, p. xv.

[56] *L.Q.R.,* XVII, p. 234. Bickley, I, p. xxxi.

[57] Senior, p. 20.

[58] *Black Bk. of Adm.,* I, pp. 88 *et seqq.*

[59] Bateson, II, pp. 184–187. *Black Bk. of Adm.,* II, p. 23. *Select Pleas Ct. Adm.,* II, p. xxi.

[60] *Black Bk. of Adm.,* II, p. 27. *Select Pleas Ct. Adm.,* I, pp. xlix, lxxx.

[61] *Black Bk. of Adm.,* II, p. 23. "The plees yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that abydene not but her tyde, shuldene ben pleted from tyde to tyde."

[62] Stubbs, pp. 133–134, Newcastle-upon-Tyne, *temp.* Hen. I. "Inter burgensem et mercatorem si placitum oriatur, finiatur ante tertiam refluxionem maris." Bateson, II, p. 184. *Leges Quatuor Burgorum of Scotland,* cap. 8, *circa* 1270. "Si placitum oriatur inter burgensem et mercatorem, terminari debet infra tertiam refluxionem maris."

[63] *Select Pleas Ct. Adm.,* II, p. xxi; I, p. xlix.

[64] Prynne's *Animadversions,* p. 117. *Black Bk. of Adm.,* I, pp. lxi–lxii. *Select Pleas Ct. Adm.,* II, p. xliii.

[65] Marsden, *Law and Customs of the Sea,* I, pp. 54–55. *Black Bk. of Adm.,* I, p. lxx.

[66] *Select Pleas Ct. Adm.,* II, p. xxii.

And this is almost all that can be definitely said about the local marine courts, other than to trace their further developments. They were not courts of record, but, even if informal records were kept, practically none have been preserved to us. We cannot, therefore, say what type of cases predominated there, or what specific rules of law were established by their decisions. From our previous studies we can conjecture, nevertheless, that their rapid, summary, and informal procedure, before those judges who were expert in the ways and customs of the sea, must have been as eminently satisfactory to the Englishman as they were elsewhere to the Catalan. The law administered, as based on the Rolls of Oléron, tells us that as yet commerce had not begun to grow very complicated, for there were many points about which no provision was made, and the law would naturally require a development and an extension as soon as the maritime traffic increased. In the XIII Century this was already taking place, as we can see by the eleven additional rules, two of which are certainly English.[68] Nevertheless, the rules of this code were probably sufficient to guide the merchants and seamen in the settlement of most of the cases which came before them in this early period.[69]

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[67] *Select Pleas Ct. Adm.*, II, p. xxviii–xxix.

The king endeavored to supervise and to control this local jurisdiction over maritime cases, for it was subject to a great disadvantage in actual practice. We have already spoken at some length of the prevalence of piracy in the Mediterranean in mediæval days.[70] It was an equally great menace in the waters about Britain,[71] and it was a source of perpetual difficulties which were sometimes overcome by the use of convoys, as in 1315,[72] when the Cinque Ports were ordered to provide for the safety of merchants coming to England, and in 1353 and 1372,[73] when the wine fleet was convoyed back from Gascony. The records of this period are full of cases of piracy and of spoil at sea, and, as we have observed, they are to become the principal concern of the future Court of Admiralty. With this we must mention again the mediæval system of reprisals. Even up until the XVI Century the king was held personally liable for these activities of his subjects, and he had either to see that justice was done, or else to pay the damages out of his own pocket, failing which he had to fear the declaration of reprisals, and we have seen above that the consequences might be even more serious for him than for his subjects—it was thus that Edward I lost the Duchy of Guienne.[74] Now the courts in which the king would endeavor to see that justice was done would be the local courts, but indications are not wanting to show that there was a considerable amount of prejudice in England against foreigners, and that it was often difficult to get justice done.[75] The most remarkable diversity ensued, and the jurisdiction was eventually parcelled out to almost every branch of the English legal system. Many ways were tried, and throughout the reigns of John, Henry III, Edward I, Edward II, and much of the reign of Edward III matters which had earlier come before the local courts and which later came before the Admiralty Court were often dealt with at common law or before the Chancellor or the Council.[76] Sometimes writs were sent to the mayors and bailiffs of the seaport towns directing them to proceed, and, if they failed to obey, attaching them for contempt.[77] Sometimes the Sheriff was directed to proceed arbitrarily, or to hear the case.[78] Frequently special commissions were issued to the King's justices or to others to try these cases, chiefly of spoil or piracy.[79] During the

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[68] Above, pp. 67–70.

[69] Desjardins, p. 35. "Ces dispositions dont le fond et la forme expliquent également la prompte diffusion . . . étaient conçues dans un esprit três-pratique et rédigées dans un langage accessible aux esprits les moins cultivés."

[70] Above, pp. 13, 38–39, 57, 92.

[71] Schanz, I, p. 353. "Die englischen Herrscher mussten in den frühesten Epochen erkennen, dass nicht bloss Handel, sondern auch Schutz und Eroberung auf den beweglichen Kiel gegrundet sei."

[72] Marsden, *Law and Customs of the Sea,* I, pp. 59–61.

[73] *Ib.,* pp. 92–94. Nys, p. 231.

[74] Above, p. 227.

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[75] *Select Pleas Ct. Adm.,* I, pp. xiv, xxiii. And cf. the preamble to the statute 9 Edw. III, cap. 1 (1335): "people of cities, boroughs, ports of the sea, and other places which in time long past have not suffered, nor yet will suffer Merchant Strangers." Also Marsden, *Law and Customs of the Sea,* I, pp. xii–xiii.

[76] *Select Cases before the King's Council,* p. xxviii.

[77] In 1215 a writ to bailiffs of ports to arrest pirates and spoiled goods, and to restore the goods to their owners, *Pat.* 16 John, m. 8; in 1237 a writ to the Mayor, etc., of Sandwich to equip a ship to arrest pirates, *Pat.* 21 Hen. III, m. 6; in 1315 a writ was sent to the Mayor and bailiffs of Rye to hold an inquiry into spoil by pirates. Failing to obey, a writ was sent to the constable of Dover Castle to arrest the mayor, bailiffs, pirates, and the spoiled goods; *Select Pleas Ct. Adm.,* I, p. xx. In 1323 a writ was addressed to the sheriff of Gloucester to arrest spoilers and their ship with the aid of the Mayor and bailiffs of Bristol, and to try the case in their court, *ib.,* p. xxiv. In 1352 a precept was sent to the Mayor and bailiffs of Southampton directing them to arrest certain pirates and the goods that they had seized, and to bring them before the Council, *ib.,* p. xxxix.

[78] In 1216 a writ to bailiffs of ports to arrest and restore a piratically captured ship, Marsden, *Law and Customs of Sea,* I, pp. 2–3; in 1225 a writ to the Sheriff of Cornwall to arrest buyers and sellers of wreck belonging to the King, and to bring the rest of the goods to Portsmouth, *Cl.* 9 Hen. III, m. 15, Rec. Ed. p. 12.a; in 1227 a writ to the Sheriff of Sussex to arrest spoilers of a wreck and to restore the goods, *Cl.* 11 Hen. III, m.7, Rec. Ed. p. 192.b; in 1227 a writ to the Sheriff of Norfolk to receive a pirate prisoner from the bailiffs of Dunwich and to deliver him to Newgate gaoler, *Cl.* 11 Hen. III, m.1, Rec. Ed. II, 203.b; in 1228 a pirate hung, Marsden, *Law and Customs of the Sea,* I, pp. 6–7; in 1324 a writ to a Sheriff with a commission oyer et terminer on spoil at sea, *Rot. Orig.* 17 Ed. II, p. 2, rot. 32.

[79] In 1227 a writ to bring pirates before the Justices *ad respondendum, Cl.* 11 Hen. III, m.21, Rec. Ed. II, 167; in 1283 a commission oyer et terminer issued to two justices of the King's Bench to try a case of freight of wine brought from Gascony to Ipswich, *secundum legem mercatoriam;* the action had originally been brought in the court of the bailiffs at Ipswich, *Select Pleas*

Ct. Adm., II, p. xliii; in 1285 commission oyer et terminer on piracy, the jury to be part Germans and the commissioners to take instructions from the Council if in difficulty, *Pat.* 13 Ed. I, m.17; in 1291 a comm. o. et t. to Warden of Cinque Ports, concerning restitution on proof of spoil of the men of France by men of the ports of the King of England, *Pat.* 19 Ed. I, m.17, Marsden, *Law and Cust. of Sea,* I, pp. 10–12; in 1304 a comm. o. et t., spoil of wreck, *Pat.* 32 Ed. I, pt. I, m.2.d; same, piracy, trial *secundum legem mercatoriam, Pat.* 32 Ed. I, pt. 2, m.4.d; in 1308 a commission to *auditores* to inquire of spoils alleged to have been committed by Frenchmen upon Englishmen, *Select Pleas Ct. Adm.*, I, p. xviii; in 1313 a comm. to justices to hear piracy claims by Flemings *secundum legem et consuetudinem dicti regni et similiter legem mercatoriam absque dilatione morosa.* The Flemings refused to appear, *Select Pleas Ct. Adm.*, I, p. xix; in 1315 a comm. o. et t. on spoil at sea, *Pat.* 8 Ed. II, pt. 2, mm. 12d, 18d, 26; in 1319, same, *Pat.* 12 Ed. II, pt. 1, m.13d; in 1325 a comm., capture of royal fish, *Pat.* 19 Ed. II, pt. 2, m.22; in 1326, same, *Pat.* 20 Ed. II, m.13d; in 1327 a commission to judges to make restitution of goods found to be spoiled, *Pat.* 1 Ed. III, pt. 1, m.5d; in 1327 a comm. o. et t., spoil at sea, *Pat.* 1 Ed. III, pt. 2, m.6d; in 1329 a comm. to survey a weir, *Pat.* 3 Ed. III, pt. 1, m.3d; in 1329 a comm. o. et t. pursuant to a treaty, spoil at sea, *Pat.* 3 Ed. III, pt. 2, m.15d; in 1330, a comm. o. et t., taking of a whale, *Pat.* 4 Ed. III, pt. 1, m.6d; in 1330 a comm. o. et t., spoil at sea, 4 Ed. III, pt. 2, m.14d; in 1331, same, *Pat.* 5 Ed. III, pt. 1, mm.22d, 27d; same, spoil of wreck, *ib.*, pt. 2, m.4d; same, a weir in the Wye, *ib.*, pt. 2, m.21d; in 1332 a comm. to inquire as to obstructions in the Derwent, *Pat.* 6 Ed. III, pt. 1, m.15d; in 1352, same, in the Thames, *Pat.* 26 Ed. III, pt. 1, m.24d; in 1333 a comm. o. et t., spoil of wreck, *Pat.* 7 Ed. III, pt. 1, m.15d; same, *ib.*, pt. 2, m.26d; in 1334, same, *Pat.* 8 Ed. III, pt. 1, m.21d; same, *ib.*, pt. 1, m.28d; in 1336 a comm. o. et t., spoil at sea, *Pat.* 10 Ed. III, pt. 1, mm.33, 38, 40; same, goods found in a ship, *ib.*, pt. 2, m.2d; in 1338 a comm. o. et t., piracy, restitution on imprisonment of spoilers, distraint on localities implicated, *Pat.* 12 Ed. III, pt. 1, m.32d; in 1338 a comm. on spoiled ships of the Count of Gueldres—the king adds that he fears he may have to satisfy the claims himself, *Select Pleas Ct. Adm.*, I, p. xxvii; in 1339 a comm. o. et t., piracy, the jury to ascertain the names of receivers of spoiled goods, *ib.*, I, p. xxviii; in 1339 a comm. o. et t. to try piracy committed by Englishmen on Spanish, Portuguese, and Catalan merchants in Southampton water, restitution or damages, distraint upon localities harboring the pirates, *ib.*, p. xxix; in 1341 a comm. o. et t., spoil at sea of a Spanish ship, *Pat.* 15 Ed. III, pt. 2, m.48d; in 1342 same, spoil at Fowey, direction to seize the ship spoiled into the King's hands and to return names of spoilers, 16 Ed. III, pt. 1, m.28d; in 1341 a comm. o. et t., piracy to be tried according to the common law, *Select Pleas Ct. Adm.*, I, p. xxxvi; in 1344 a comm. o. et t., spoil at Dartmouth, civil and criminal, *Pat.* 18 Ed. III, pt. 2, m.5d; in 1352 a comm. out of Chancery empowering commissioners to imprison one who failed to make restitution of goods spoiled, *Pat.* 26 Ed. III, pt. 2, m.16d. Cf. *Pat.* 8 Ed. IV, pt. 1, mm.9d, 8d; *Pat.* 6 Rich. II, d, *passim.* In 1352 a comm. o. et t. to *locum tenens* of Admiral, spoil of wreck, *Pat.* 26 Ed. III, pt. 3, m.14d; similar, *ib.*, m.11d; in 1359 a comm. o. et t., spoil in violation of a truce, *Pat.* 33 Ed. III, pt. 2, m.30d; in 1361 same, piracy, *Pat.* 35 Ed. III, pt. 1, m.9d; same, spoil at sea, *ib.*, m.9d: same, spoil of wreck, *ib.*, pt. 3, mm.10d, 28d; same, a whale, *Origin.* 35 Ed. III, rot. 32, Rec. Ed. Vol. II, fo. 110b; in 1370 a comm. o. et t., piracy and treason at sea by adhering to the king's enemies, trial by jury *secundum legem maritimam* and before admiral. As

XIV Century they were sometimes tried at common law,[80] and some-

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defendant was a foreigner the jury was composed of natives and merchants, *Cl.* 43 Ed. III, m.4.

[80] Holdsworth, *H.E.L.*, I, p. 534. The courts of common law do not seem to have had jurisdiction over contracts made abroad except by special commission, *Select Pleas Ct. Adm.*, II, p. xliii. *Year Books,* 1, 2 Ed. II, 1308–1309 (Selden Society), pp. 110, 111; 12, 13 Ed. III, 1337–1338 (Rolls Series), pp. 364, 366; in 1394 it appears that there was no remedy for breach of charter party made abroad, *Copyn v. Snoke, Pat.* 17 Rich. II, pt. 1, m.7. On the contrary, unless it is desired to assimilate all the cases of spoil to piracy, it is plainly evident that the common law had some jurisdiction of tort. We ourselves find it easy to make a legal distinction between spoil and piracy, the former being robbery of foreigners at sea, the latter being robbery of foreigners or of natives indiscriminately. We admit that in the practice of the Middle Ages there seems to have been little real distinction, and for purposes of convenience we shall treat them together. In 1280 it was clearly decided that the common law courts had no jurisdiction to redress a tort committed abroad, in Florence, *Select Pleas Ct. Adm.*, II, pp. xliii–xliv; in 1296–1297, however, the Court of Common Pleas claimed jurisdiction of torts and murders committed on the high seas. It was claimed that the Admiral had jurisdiction, but the Court claimed not to have heard of it; per Bereford, J., "We have general power throughout the whole of England, but of the power of the Admirals of whom you speak we know nothing. Nor are we minded to yield to them any of our power, if it be not so done by command of the King, of which you show us nothing." *Select Pleas Ct. Adm.*, I, pp. xvii–xviii; in 1327 piracy and murder, *ib.*, p. xxv: in 1363 a case of murder and piracy was tried in the King's Bench, *Mich.* 38 Ed. III, rot. 33, Rex. Cf. Hale, P. C., II, pp. 12–15 and Cockburn, C. J., in *Regina v. Keyn* (1876), 2 Ex. Div. 163, 167. The dictum of Staunton, J., in *The Eyre of Kent,* cannot be properly construed to mean that on the high seas the ordinary criminal courts had no jurisdiction; by its own terms it is restricted to small inlets across which a man can see, *The Eyre of Kent* (Selden Society), I, p. 133. In cases of piracy, spoil, wreck, droits, and fisheries, as well as in some others, the common law once exercised a considerable jurisdiction, as witness the following (*Select Pleas Ct. Adm.*, I, p. xv.): Assize Rolls; in 1314 piracy, 17 Ed. II, Suth.; in 1314–1315 piracy, 17 and 18 Ed. II, Suth.; in 1338 piracy, 12 Ed. III, Suth. In the King's Bench, *Coram Rege Rolls:* in 1274 taking a whale, issue from Chancery, 2 Ed. I, rot. 1, Suth.; in 1275–1276 seizure of ship at sea, 3 and 4 Ed. I, rot. 3, Ebor; in 1276 fishery, *East.* 4 Ed. I, rot. 4; in 1276 piracy, *Mich.* 4 Ed. I, rot. 23, Norf; in 1276 claim by the King to goods captured from the enemy, Marsden, *Law and Cust. Sea,* I, p. 8; in 1285–1286 erection of weir, *Mich.* 13 and 14 Ed. I, rot. 6, Suth.; in 1287 piracy, 15 Ed. I, rot. 28; in 1293–1294 piracy and spoil, *Select Pleas Ct. Adm.*, I, pp. xvi–xvii; in 1307 fishery, 35 Ed. I, rot. 18, Suff; in 1309 piracy, 2 Ed. II, rot. 33, Lond.; in 1314 taking porpoises, *Hil.* 7 Ed. II, rot. 12; in 1315 piracy, *Trin.* 8 Ed. II, rot. 20, 38, 74, 83, 111d; in 1317 fishery, *Trin.* 10 Ed. II, rot. 83, Norf; in 1318 piracy, *Hil.* 11 Ed. II, rot. 74; in 1322 damages recovered for spoil at sea, *Mich.* 15 Ed. II, rot. 142; in 1323 a case of spoil before the Bristol local court moved by certiorari into King's Bench, *Select Pleas Ct. Adm.*, I, p. xxiv; in 1325 piracy, *Trin.* 18 Ed. II, rot. 17, 18; in 1326 piracy, *Mich.* 19 Ed. II, rot. 17, Rex; in 1342–1343 four cases of spoil, *Select Pleas Ct. Adm.*, I, p. xxxvii; in 1343 conviction of one

times the King's Council took jurisdiction,[81] and sometimes the Chan-

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who had received spoiled goods as an accessory to the piracy quashed because the principal was not convicted, *East.* 17 Ed. III, rot. 83; in 1343 piracy ("one of the last cases in which pirates were tried and convicted upon the criminal charge at common law," *Select Pleas Ct. Adm.*, I, p. xxxviii), *Trin.* 16 Ed. III, rot. 25; in 1343 piracy, *East.* 17 Ed. III, rot. 5, 28, 36; in 1345 obstructions in river Lee, *Mich.* 19 Ed. III, rot. 51; in 1351 piracy, *Trin.* 25 Ed. III, rot. 22; in 1352 piracy, *Mich.* 26 Ed. III, rot. 51; in 1353 piracy, *Mich.* 27 Ed. III, rot. 29, Rex; in 1360 arrest of Flemish goods in reprisal *secundum legem mercatoriam, Trin.* 34 Ed. III, rot. 34; in 1364 murder and piracy, *Mich.* 38 Ed. III, rot. 33, Rex; in 1374 piracy tried at common law, but saving the Admiral's jurisdiction, Marsden, *Law and Cust. Sea,* I, pp. 99–101; in 1377 piracy tried before the justices by the common law and by maritime law—*secundum legem et consuetudinem regni nostri ac legem marittimam*—without prejudice to the rights of the Admiral, *Select Pleas Ct. Adm.*, I, p. xlviii; in 1377 commissions to justices to hear cases of wreck, *ib.*, pp. xliv–xlv, xlviii; in 1377 fishery, *Trin.* 50 Ed. III, rot. 2; in 1385 piracy, issue from Chancery, *Hil.* 8 Rich. II, rot. 18, Suth.; in 1408 fishery, *East.* 9 Hen. IV, rot. 44. Also a few further common law cases: in 1314 French piracy claimants directed to sue at common law, *Select Pleas Ct. Adm.*, I, p. xix; in 1327 piracy and murder, *ib.*, p. xxv; in 1328 piracy, proof by oath of merchants and others, *ib.*, p. xxvi; in 1341 action by the King in the court of Exchequer as to enemy goods detained by the captors, Marsden, *Law and Cust. Sea,* I, pp. 69–74; in 1341 a comm. o. et t. to try piracy at common law. *Select Pleas Ct. Adm.*, I, p. xxxvi; in 1349 property in recaptured goods restored to original owners, *ib.*, p. xxxix; in 1362 wreck—these cases always properly belonged to common law courts, *ib.*, pp. xliv–xlv; in 1361 a comm. of o. et t. was recalled, in a case of piracy and murder, on the ground that it was triable *non coram Justiciariis nostris ad communem legem sed coram Admirallis nostris juxta legem marittimam.* Hereafter both civil and criminal cases of piracy appear to have been usually tried before the Admiral, sometimes without a jury, until 28 Hen. VIII, c. 15, *ib.*, p. xlv. In 1429 the criminal jurisdiction of the common law courts in cases of piracy appears to have fallen into desuetude. *Ib.*, p. liv.

[81] The Chancellor's jurisdiction was the outgrowth of that of the Council. *Select Cases before the King's Council* (Selden Society), pp. xxiii–xxv. The Council does not seem to have concerned itself in Admiralty matters before the beginning of the XIV Century. After then we find a number of cases, but they are often sent to the Chancellor to decide. In judicial matters the Council preferred not to hear cases itself but to facilitate their hearing by other courts; *ib.*, p. xviii. In 1285 a commission of oyer et terminer, piracy; the jury to be part Germans and the commissioners to take instructions from the Council if in difficulty, *Pat.* 13 Ed. I, m. 17; in 1294 a case of spoil, *Select Pleas Ct. Adm.*, I, xvii; in 1314–1315 a case of spoil was tried before the Chancellor, also inquisition was made into a charge of spoil, the return to be made into Chancery; in these and other cases of about the same period—1321, 1347—the proceedings began by a petition to the Council, *ib.*, p. xx; in 1315 the Council directed the constable of Dover to do speedy justice in the matter of a wrecked Bayonnese ship spoiled by the men of Rye, *Select Pleas Ct. Adm.*, I, p. xxiii; in 1322 a petition to the Council on spoil at sea, answered *habeant breve de transgressione, Rot. Parl.* 15 and 16 Ed. II, nu. 152; in 1325 a petition to the Council of spoil at sea by men of Yarmouth is referred to the Chancellor to investigate and to certify to the King; this was the customary

cellor.[82] A glance at the notes we have appended will show that at

mode of procedure, *Select Pleas Ct. Adm.*, I, p. xxv; in 1327 a petition concerning piracy by Frenchmen upon an English ship off Brest, the petition being referred to the Chancellor to arrest French goods; two other cases are referred to of the same date, in which the goods of foreigners were arrested in consequence of the English petitioners being unable to obtain justice in the foreign courts, *ib.*, p. xxv; in 1343 claims of piracy were tried, one turning out to be a lawful prize, and by the law maritime the goods belonged to the captors, *iuxta legem maritimam, ib.*, pp. xxxviii–xxxix; in 1347 piracy is tried before the Council and a mandate from Chancery issues to arrest those into whose hands the goods had come, *ib.*, p. xxxix; in 1352 a pirate is tried before the Council, *ib.*, p. xxxix; in 1352 a precept is sent to the Mayor and bailiffs of Southampton to arrest certain pirates and the goods that they had seized and to bring them before the Council to be dealt with as it shall direct, *ib.*, p. xxxix–xl. In 1353 we have a queer hybrid court. A case of recapture from pirates is tried before the Admiral and the Council and restitution is ordered because *per legem maritimam* the ownership of goods taken from pirates is not divested unless the goods remain in the pirates' possession for a night, *ib.*, p. xl; in 1361 a commission oyer et terminer in a case of piracy and murder to be tried at common law, is recalled upon the advice of the Council that felonies, trespasses, and injuries done upon the sea should be tried by the law maritime before the Admiral, *ib.* p. xlv; in 1382 a reference by the Council to the Admiral of the North was brought back to the Council by a writ of certiorari, after some delay in the Admiral's Court. The crew had left a ship in fear of their lives because of an enemy's ship that was about to capture her; she drove ashore and was claimed by the Abbot of Wymondham as wreck. The Council held she was not a wreck and decreed restitution, on payment of salvage, *ib.*, II, pp. lviii–lix; in 1383 a writ to bring before the Council upon a charge of contempt one who had committed piracy, *ib.*, I, p. xlviii.

[82] "The determination of matters connected with piracy, and the ownership of goods taken at sea, appears to have been from the earliest times peculiarly within the jurisdiction of the Chancellor. Sometimes the whole matter was disposed of by him, and sometimes issues as to piracy or no piracy, and as to the ownership of property and ships spoiled, were directed out of Chancery to the King's Bench or to commissioners of oyer and terminer. Such issues, returnable into Chancery, were tried by juries taken from the county next to which the spoil was committed, or from the county to which the spoiled property was brought or the spoilers came; and the juries were sometimes of 'good and lawful' men, and sometimes of merchants and mariners. The commissions direct the trial to be either 'secundum legem et consuetudinem regni Angliæ' or 'secundum legem mercatoriam' or 'maritimam.' The granting of letters of reprisal and marque was also within the jurisdiction of the Chancellor. It was 'the most noble and eminent piece of the jurisdiction of the Chancery.'" *Select Pleas Ct. Adm.*, I, p. xvi. Four such cases are: in 1319, *Cl.* 12 Ed. II, m.9; in 1344, *Cl.* 18 Ed. III, pt. 2, m.9; in 1345, *Cl.* 19 Ed. III, pt. 1, m.10, 11; and *ib.*, pt. 2, m.17. Nevertheless, the records of cases with which the Chancellor was concerned are lamentably scanty. In 1274, taking a whale, issue sent to the King's Bench from Chancery, *Coram Rege Rolls*, 2 Ed. I, rot. 1, Suth.; in 1293, *Helemes v. Opright*, the plaintiff sued the defendant before the Chancellor or the Council for the non-delivery of wines upon a charter party; defence, spoil at sea; this latter issue was sent to the King's Bench, *Select Pleas Ct. Adm.*, I, pp. xvi–xvii; in 1297 writ from

this period there appears to have been much uncertainty as to the proper place in which to bring suit,[83] and such continued to be the situation even at the end of the XIV Century, when we meet with an extreme case. In 1394 John Copyn, master of the *Gabriel* of St. Osyth, sued William Snoke and Thomas Saylyngham for the non-payment of freight on a cargo of wine brought by him, under a charter party made at Bordeaux, from thence to Gadenasse in Essex. He had sued first at common law and then in the Admiralty Court of the North and could get no redress in either court. He then tried the Court of the Constable and Marshall, but the judge held that he, too, had no jurisdiction and gave judgment against Copyn with heavy costs. No doubt in despair, Copyn appealed to the King, who appointed judges to hear the appeal.[84] Such was the chaotic legal state of affairs which surrounded the creation of the Court of Admiralty.

Now, before we take up the development of the state of maritime affairs which led to the creation of the Court, we must say a few words as to the office of the Admiral himself, since it was in existence for some time before the court was created. The duties which the early

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Chancery directing the restitution of Spanish goods spoiled at sea, *Cl.* 25 Ed. I, m.14; in 1297 writ from Chancery directing restitution of a foreign ship arrested in time of peace, though war was since declared, *Cl.* 25 Ed. I, m.16; in 1314–1315 there are records of a case of spoil being tried before the Chancellor, and of inquisition being ordered to be made into a charge of spoil, the return to be made into Chancery. In these and in other cases of about the same period—1321, 1347—the proceedings began by petition to the Council, *Select Pleas Ct. Adm.*, I, p. xx; in 1325, piracy; petition to Council referred to Chancellor to inquire and certify the King, *ib.*, p. xxv; in 1327 piracy, reference of the petition to the Council to the Chancellor; arrest of foreign goods, *ib.*, p. xxv; in 1327 inquisition into piracy and murder returnable into Chancery; trial at common law, *ib.*, pp. xxv–xxvi; in 1346 order from Chancery to arrest goods spoiled and the bodies of those in whose hands they are found, *Cl.* 20 Ed. III, pt. 1, m.22; in 1346 writ from Chancery declaring forfeiture of enemies' goods in friends' ship, freight and mariners' wages being paid (reference doubtful), *Cl.* 20 Ed. III, pt. 1, m.24; in 1351 writ from Chancery to take pirates and bring them before the Council, *Cl.* 25 Ed. III, m.6d; in 1352 commission out of Chancery empowering commissioners to imprison one who failed to make restitution of goods spoiled (Cf. *Pat.* 8 Ed. IV, pt. 1, mm. 8d, 9d; *Pat.* 6 Rich. II, d, *passim*), *Pat,* 26 Ed. III, pt. 2, m.16d; in 1384 piracy before the Chancellor, then sent to King's Bench to be tried with a jury of merchants and others, half foreign, half English, *Select Pleas Ct. Adm.*, I, pp. xlviii–xlix; in 1385 piracy tried at common law, issue from Chancery, *Coram Rege Rolls, Hil.* 8 Rich. II, rot. 18, Suth. Also, in 1390, *Sampson c. Curteys, Select Pleas Ct. Adm.*, I, p. 1; and, in 1404, *Gernesey c. Henton, ib.*, p. 17; both removed from the Admiral's Court into Chancery by writs of certiorari.

[83] Senior, p. 26.

[84] *Pat.* 17 Rich. H, pt. 1, m.7. *Cal. Pat. Rolls,* Nov. 25, 1393.

Admirals performed were those of the commanding officer of the King's ships, and such an officer was in existence before the title "Admiral" was in use. When we first can trace him in England he is known as the *guardian of the sea,* the *custos maris,*[85] and this title was preserved to a somewhat later period and was, at first, used quite indifferently as a synonym for the title of Admiral.[86] From the end of the XIII Century onwards the usual title is Admiral. The word is derived from the Arabic *Emir* or *Amir al bahr,* commander of the sea,[87] and became naturalized in Europe after the Fourth Crusade.[88] It was in use in Spain as early as 1247, when Ferdinand appointed a Frenchman, Don Ramon Bonifaz, as the first Admiral of Castile.[89] In 1258 the word seems to have been sufficiently novel to require an explanation: "The chief of all those who compose the crews of the vessels fitted out for war is called the Admiral, and he has over the fleet, which is the main body of the Armada, or over a squadron, which may be detached, the same power as the king himself if he were present." [90] It was in Anglo-French use in 1295, when Berardo de Sestars was appointed Admiral of the Bayonne fleet; [91] it was used in England in 1297; [92] and in 1300 Gervase Alard was appointed Admiral of the Cinque Ports.[93] In 1303 there is mention of a French Admiral of the Sea.[94] "It would appear, therefore, that the title of Admiral, originating probably in the East and afterwards adopted by the Genoese and other navies of the Mediterranean, came by way of Gascony to England and was there adopted about the beginning of the fourteenth century." [95]

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[85] Williams and Bruce, 2nd ed. p. 3. In 1264 Thomas de Moleton was constituted *capitaneus maris,* Browne, *A Compendious View . . . of the Law of Admiralty,* II, p. 25 and authorities there cited.

[86] *Select Pleas Ct. Adm.,* I, p. xxiii, n. 3. "In the early records 'custos' and 'custodia' are used, frequently as equivalent to 'admirallus' and 'admirallitas.'" Cf. *ib.,* p. xxxv. Browne, *A Compendious View . . . of the Law of Admiralty,* II, p. 25. "Whatever may be the truth as to the name, the office was certainly known and used in England before the reign of Edward the first; and therefore when an eminent writer says there was no such office till his reign,—(*Reeves*—History of English Law, II, p. 472. 'The office of admiral is considered by the French as a piece of state invented by them; nor does it appear that any officer of this kind was constituted in England till about the time of Edward I.') he must mean, not known by that name; for my lord Coke says, the admiral, and court of admiralty, were time out of mind; though he was at first called *capitaneus maris,* and by other names."

[87] *Black Bk. of Adm.,* II, p. lxiii, n. 1. Westlake (War), p. 138. Nys, p. 259.

[88] *Black Bk. of Adm.,* II, p. lxiii.

[89] Peschel, *Geschichte des Zeitalters der Entdeckungen,* p. 45, n. 2.

[90] *Black Bk. of Adm.,* II, p. lxiii, from the Siete Partidas of Alphonso X of Castile. Nys, pp. 259–260.

[91] *Select Pleas Ct. Adm.,* I, p. xii.

[92] *Ib.,* p. xvii. Westlake (War), p. 139. Also in a treaty made by Edward I with Count Guy of Flanders in the same year William de Leybourne is named "Admiral of the sea of the king of England." Marsden, *Law and Custom of the Sea,* I, pp. 46–48. *Fœdera,* March 8, 1297. *Select Pleas Ct. Adm.,* I, p. xxxiii. Browne, *A Compendious View . . . of the Law of Admiralty,* II, pp. 24–25, criticizing Spelman's glossary for placing the first Admiral in the

We must again repeat that the original duties of the Admiral seem to have been exclusively administrative and military.[96] "For more than half a century after the first occurrence of the title

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reign of Richard II. In their texts both Browne and Spelman date the title of Admiral back much further than we have any evidence. "Sir Henry Spelman . . . was of opinion that this high officer [the admiral] was not known in England by that name or stile until the beginning of the reign of Edward the first, *i.e.* about the year 1272—(This bears a striking propinquity to the time when Causy was appointed admiral of France; and when we look into history and see that about this time the seas were extravagantly infested by pirates, which produced a war between England and France, we shall suspect a similarity of causes)."

[93] *Select Pleas Ct. Adm.*, I, p. xii.

[94] Named Reyner de Grimaldi, a Genoese; *Select Pleas Ct. Adm.*, I, p. xxxi. There certainly was a French Admiral in 1299; Hall, p. 145. In 1318 there was a French Admiral of Calais; *Select Pleas Ct. Adm.*, I, p. xxi. There was a French Admiral in 1300 and perhaps one about 1280; Browne, *A Compendious View . . . of the Law of Admiralty,* II, pp. 23–24. "Now it appears by the authority of John Tillius, a clerk of the parliament of Paris, who wrote *De Rebus Gallicis,* that . . . the first admiral of France was *Americus* or *Amaurius,* viscount of Narbonne, so constituted in King John's reign, about the year 1300 . . . those who pay any attention to probability, do not pretend that Amaurius had any predecessor except Enguarantus Dom de Causy, about twenty years before, in the reign of Philip the Bold; at least not as admiral of all France, for it is said that there were at one time two, at another time three admirals in France, dividing their jurisdiction according to the coasts of their several provinces respectively." Desjardins, p. 71, n. 2. does not know of any French Admiral before 1326–1327.

[95] *Select Pleas Ct. Adm.*, I, p. xii. Prynne and Coke are not quite accurate. Prynne on the Fourth Institute, pp. 106, 123; 2 Co. Litt. 260, b. "The jurisdiction of the Lord Admirall is verie antient and long before the reign of Edward the third, as some have supposed, as may appear by the laws of Oleron . . . that there had been an admirall time out of minde, and by many other antient records in the reignes of Henrie the third, Edward the first, and Edward the second, is most manifest." Correspondence between the Kings of England and France in 1263 and in 1265 on the subject of piracy claims makes no mention of an Admiralty Court or of an Admiral, *Select Pleas Ct. Adm.*, I, p. xxxvi.

[96] Williams and Bruce, p. 3, citing Spelman's *Admiralty Jurisdiction,* p. 221. "Yet though there were many admirals before the time of Ed. III, yet I find not that they had any jurisdiction therein. . . . They had the keeping of the seas and full authority by the king's commission to invade among and spoile all French merchants. So that in short they were admirals for military action, not for civil jurisdiction."

'Admiral,' no mention is to be found . . . of the existence of an Admiral's Court having power to hear pleas and to administer justice between parties." [97] Our next mention of the English Admirals confirms their disciplinary power,[98] for in 1316 Edward II finds fault with them for allowing their ships to commit spoils.[99] In 1323 the Admiral was ordered to hold an inquisition on a complaint of spoil at sea. The case itself was tried in the local court at Bristol and it appears that the functions of the Admiral at this period were restricted to the holding of the inquisition and to the arrest of the pirate ship; he evidently lacked power to arrest the goods of the pirate on shore.[100] In 1327 the Admiral is one of two commissioners appointed by a writ out of Chancery to inquire into a case of piracy and murder; the persons indicted appear to have been tried at common law.[101] In 1337 the English Admiral was a Genoese from the famous nautical family of Usodimare.[102] In 1338 a writ is sent to the Admiral, directing him to inquire into a case of spoil, to arrest the spoilers, when identified, and

[97] *Select Pleas Ct. Adm.*, I, p. xiii.

[98] Since there was no clear distinction between the mariner and the pirate at this time, and little between piracy and maritime warfare, the Admiral, as the disciplinary head of all the mariners, and as the commander of the war fleet, was the natural and appropriate person to have the later cognizance of piracy. Cf. Nys, pp. 211–212. "'La guerre sur mer est une chose désespérée.' Ainsi s'expriment les *Siete Partidas*. Durant les premiers siècles du moyen âge, la guerre maritime ne fut que piraterie. Les Sarrasins, nous l'avons vu, maîtres de la Perse, de la Syrie, de l'Égypte, n'avaient pas tardé à menacer les populations méditerranéennes. Arabes et chrétiens se livraient aux déprédations les plus grandes. L'insécurité était la même dans les mers du nord. Les hostilités, du reste, étaient conduites avec une épouvantable brutalité. Les navires étaient pillés; l'équipage était jeté par-dessus bord, ou bien encore massacré ou pendu. Sur mer, plus de droit. Longtemps, les trêves ou les traités de paix conclus entre souverains n'empêchèrent, en aucune manière, la continuation des hostilités maritimes. En 1242, les sujets du duc de Bretagne continuèrent d'armer en course contre les Anglais, avec qui leur souverain venait de conclure une trêve, et il fallut l'interposition de saint Louis pour obliger le duc à réprimer l'avidité des corsaires bretons. En 1404, très probablement durant une trêve, l'héritier de la couronne d'Écosse fut capturé en mer par Henri IV; près de dix-neuf ans durant, il fut gardé prisonnier. Les villes maritimes étaient autant de repaires d'où d'audacieux pirates s'élançaient pour capturer les navires marchands. Durant les longues guerres de l'Angleterre et de la France, à certaine époque, les pirates sont maîtres de la mer. Les côtes et les îles de l'Angleterre sont ravagées par les navires français; d'autre part, de Douvres, de Rye, de Portsmouth, de Plymouth, des autres ports, de nombreux aventuriers mettent à la voile pour piller les côtes françaises."

[99] *Select Pleas Ct. Adm.*, I, p. xxi.

[100] *Ib.*, p. xxiv.

[101] *Ib.*, p. xxv–xxvi.

[102] Rymer, *Fœdera*, II, p. 585.

also the spoiled goods, and certify the result to the King.[103] In 1342 a writ was issued by which the Admiral of the North and two others made inquiry by the oaths of jurors from the county within the jurisdiction of the Admiral in a case of spoil which was tried in the King's Bench. Two of the spoilers were pardoned on producing the Admiral's certificate that they had equipped ships and gone to serve the King in his expedition to Brittany.[104] In 1347 the deputy of the Admiral of the West certified that a ship was forfeited to the King for robbery committed at sea, and it is possible that this may have been a judicial proceeding rather than an administrative one; this may be our first record of Admiralty jurisdiction.[105] In 1352 we have a commission *oyer et terminer* to the *locum tenens* of the Admiral, concerning the spoil of a wreck.[106] In 1353 there is the case of recapture from pirates which was tried in an anomalous way before the Admiral and the Council.[107]

> "Up to this point there is no reference in any contemporary document of a court of Admiralty or of a Lord High Admiral. The title of 'admiral' is a new one, not yet, as we have seen, fifty years old. There have been . . . many admirals; but their commands were of short duration, limited probably to particular service, and always to the charge of a part only of the king's fleets. They have been admirals for a particular expedition or service or of a particular district, the North, South, or West,[108] as the case may be. These early admirals and commanders at sea must always have exercised a disciplinary jurisdiction over the seamen and others on board their fleets, and some of their patents contain an express grant of disciplinary powers. Even in these matters their jurisdiction was not exclusive. Thus in 1337 commissioners were appointed to try offences committed by those on board the fleet—'exceptis marinariis et aliis qui sub castigatione et regimine admirallorum ejusdem flotæ sunt et esse debent.' This jurisdiction probably enabled the admiral to deal with depredations committed by the ships immediately under his command; but it does not appear to have included a power to hold a court administering justice generally in maritime cases." [109]

In 1357 we have the first reference to legal proceedings before the Admiral.[110] The King of Portugal claimed goods belonging to a

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[103] *Select Pleas Ct. Adm.*, I, p. xxvii–xxviii.

[104] *Ib.*, p. xxxvii. See *Black Bk. of Adm.*, I, p. 54, § 14.

[105] *Cal. Pat. Rolls*, Feb. 21, 1347.

[106] *Pat.* 26 Ed. III, pt. 3, m. 11d. Also *ib.*, m. 14d.

[107] *Select Pleas Ct. Adm.*, I, p. xl.

[108] Cf. Browne, *Compendious View of . . . the Admiralty*, II, pp. 25–26.

[109] *Select Pleas Ct. Adm.*, I, pp. xl–xli.

[110] Lambard, at the end of the XVI Century, dated the origin of the Court of Admiralty with approximate accuracy, but he is much in error in his sug-

Portuguese, which had been captured at sea by an English vessel from a French vessel which had previously spoiled the Portuguese vessel. The Portuguese owner sued for restitution of the goods before the Admiral, who declared them to belong to the English captor as good prize.[111] This decision is in direct conflict with Chapter CCXLV of the Consulate,[112] by which the ship ought to have been restored to the owners on payment of salvage. In 1360 John Pavely was appointed Captain of the Fleet, with disciplinary powers, and, for the first time, with the express power to hold pleas and to "do full justice in all and sundry matters of this sort which pertain to the captain, by law and according to the maritime law." [113] This would seem to be the first reference to the erection of the court, of which mention was made in 1357. In this same year we have the first reference to the existence of a High Admiral commanding the three fleets of the North, West, and South.[114] He held office for a year and was then succeeded by another

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gested etymology for the word "Admiral," wherein he follows Dr. Caius, the refounder of Gonville and Caius College, Cambridge. Lambard, *Archion,* pp. 49–51. "*Britton* . . . leaveth the *soveraigne Jurisdiction* of all Causes in the *King:* So that whatsoever the King hath not particularly delivered out to others, his Iustices *Commissioners* and *Delegats* that still remained in himselfe, and was exercised either by himselfe in person, or by his *Chancellor, Counsellors* of Estate, and *Justices* of Law that continually attended upon him for that service. And therefore, first concerning the *Admiralty,* I think that the decision of *marine* Causes was not put out of the Kings House, and committed to the charge of the Admirall, untill the time of King *Edward* 3, whereunto I am led partly by the consideration of the time of his Reigne, which was much occupied with affaires beyond the Sea, both by reason of the warres in *France,* and of the Entercourse and Trade of Merchandize which then flourished, and partly for that I finde no mention of the *Admiralty* before the second yeere of the reigne of King *Richard* 2, who going about by a *Statute* made in the 13. yeere after his comming to the Crowne, to restraine the authority of that Court, which had exceeded her knowne limits, doth take order that she doth meddle no further than she wonted to do in the time of his *Grandfather* King *Edward* 3, thereby reducing her *authority* (as I thinke) to the first originall. This *Admirall* hath the name of the Greeke word *θαλάσσιαρχὴς* which being declined, and fallen from *Admirale* to *Admirall,* as Doctor *Caius* our Countreyman, following *Paulus Emilius,* writeth, doth signifie the *Governour,* or *Captaine* of the Navie."

[111] *Select Pleas Ct. Adm.,* I, pp. xli–xlii. Marsden, *Law and Custom of the Sea,* I, pp. 81–84.

[112] *Black Bk. of Adm.,* III, pp. 611 *et seqq.*

[113] *Select Pleas Ct. Adm.,* I, p. xlii. "Querelas omnium et singulorum armatæ prædictæ audiendi et delinquentes incarcerandi castiganti et puniendi et plenam justitiam ac omnia alia et singula quæ ad hujusmodi capitaneum et ductorem pertinent et pro bono regimine hominum prædictorum necessaria fuerint faciendi prout de jure et secundum legem maritimam fuerit faciendum."

[114] *Ib.,* I, p. xlii. *Black Bk. of Adm.,* I, p. 55, n. 3.

High Admiral, in 1361. Both of their patents contain a grant of maritime jurisdiction—*secundum legem maritimam*—in terms similar to those used in Pavely's patent, and they also contain for the first time a power for the Admiral to appoint a deputy, presumably as a judge of the newly created court.[115] The patents of the Earl of Arundel, 1386; of the Marquis of Dorset, 1398; of Sir Thomas Percy, 1399; and of Thomas Percy, Earl of Worcester, 1399; are all drawn up in similar terms.[116] One cannot say precisely when this jurisdiction originated, but it was probably after 1340 and certainly before 1357.[117] And now, having traced the rise of the Admiral to this power, let us examine the circumstances under which his court was created.

Like the Pisan *curia maris,*[118] like the Florentine *officium mercanziæ,*[119] like the French Court of Admiralty,[120] it, too, was instituted because of international difficulties arising out of commerce, particularly with respect to piracy and to reprisals.[121] "The diplomatic correspondence of the half century which preceded the battle of Sluys (1340) is distinguished by a constant stream of complaints made sometimes by the king of England against the kings of France or Spain or the Counts of Flanders, and sometimes by those and other foreign sovereigns against England, as to piracies and spoils committed at sea, and as to the inability of the aggrieved persons to obtain justice." [122] We have just noted the difficulties of foreigners in their efforts to obtain justice from the friends, relatives, and neighbors of their English despoilers.[123] This state of lawlessness at sea was of long standing and can be traced back into the XIII Century, though it hardly seems to be necessary to examine in detail all the acts of violence with which the records are crowded. A rapid glance cast over the cases given in our notes above[124] will show how predominant piracy and spoil were. With them we class acts of reprisal as adding to the general insecurity and confusion of the times.[125] Below[126] we give a short chronological list of these events.

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[115] *Select Pleas Ct. Adm.,* I, pp. xlii–xliii. "Dantes ei plenam tenore præsentium potestatem audiendi querelas omnium et singulorum de hiis quæ officium Admiralli tangunt et cognoscendi in causis maritimis et justitiam faciendi et excessus corrigendi ac delinquentes juxta eorum demerita castigandi puniendi et incarcerandi et incarceratos qui deliberandi fuerint deliberandi et omnia alia quæ ad officium Admiralli pertinent faciendi prout de jure et secundum legem marittimam sunt facienda."

[116] *Select Pleas Ct. Adm.,* I, p. xliii.

[117] *Ib.,* p. xiv. Holdsworth, *H.E.L.,* I, p. 545. Westlake (War), p. 139. Nys, p. 260. Senior, pp. 16–17.

[118] Above, pp. 57–58.

[119] Above, p. 143.

[120] Desjardins, p. 71.

[121] Senior, p. 28. "'Spoil' and piracy cases, to deal with which the Court of Admiralty was originally instituted." *Select Pleas Ct. Adm.,* I, p. xxxvi.

[122] *Ib.,* p. xiv. *Select Cases before the King's Council* (Selden Society), pp. xxvii–xxviii.

[123] Above, p. 273.

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[124] Above, pp. 273–278.

[125] A full account of the actual piracy, of the claims by the King on the Count of Flanders, and of the final issuance of reprisals in 1315, is to be found in the King's writ of that date, sent to the fair of St. Ives and commanding them to seize the property of the men of Flanders; *Select Cases on the Law*, Marchant, pp. 94–95.

[126] Before the middle of the XIV Century cases of piracy were tried before tribunals specially appointed for that purpose and not under the Admiral's jurisdiction. Even trials before commissioners of oyer and terminer and a jury seem to have often resulted in a miscarriage of justice; *Select Pleas Ct. Adm.*, I, p. xxxvi. The *Fasciculus de Superioritate Maris* refers to treaties and ordinances dealing with piracy made with France, Flanders, and Spain by John, Richard I, Henry III, Edward I, and Edward II; *ib.*, p. xxxiv. In 1228, 1235, and 1238 treaties between England and France recognize the right of reprisal; Nys, p. 63. In 1242 the Breton corsairs attacked the English, despite a truce; Nys, p. 212. In 1263 and 1265 the kings of England and France were corresponding about piracy claims; *Select Pleas Ct. Adm.*, I, p. xxxvi. Henry III, by charter, promised the citizens of Lübeck that they should not be subject to reprisals as long as their own magistrates did not neglect to compel debtors to pay; Nys, p. 66. Under Edward I and Edward II the Cinque Ports were constantly in a state of hostility with France, Flanders, Norway, and Denmark; Nys, pp. 88, 212. In 1291 the Warden of the Cinque Ports was investigating spoil committed by them against the French, under a comm. oyer et term., *Select Pleas Ct. Adm.*, II, p. lvii. In 1292 we have the beginning of the Anglo-Norman reprisals (of which we have spoken above, p. 227.) which eventually resulted in the loss of Guienne; Nys, pp. 63–64. In 1293 piracy in the Cinque Ports; *Select Pleas Ct. Adm.*, I, p. xvi; also negotiations touching the settlement of French piracy claims; *ib.*, p. xxxii. In 1294 a case of spoil; *ib.*, p. xvii. In 1296–1297, piracy, *ib.*, p. xvii. In 1297 a convention made at Bruges with reference to the settlement of piracy claims by and against the ships of England and Flanders, *ib.*, p. xii; also correspondence for the settlement of similar claims by and against mariners of Bayonne and Normandy, either by treaty, ordinance, or arbitration, *ib.*, p. xxxii. In 1304 an English Civilian and the Constable of Dover join, at Calais, two deputies named by the King of France to inquire about depredations committed at sea by the men of Calais and of the Cinque Ports on one another, *ib.*, p. xxx; also Senior, p. 6; the Frenchmen pleaded that they were acting under the orders of their admiral and in exercise of the French king's right to seize ships carrying goods to his enemies the Flemings. In 1308 a commission to inquire of spoils committed by Frenchmen upon Englishmen, *Select Pleas Ct. Adm.*, I, p. xviii. In 1309 the French king demands restitution of goods seized by Englishmen at sea, *ib.*, p. xix. In 1311 Edward II threatens the French king with letters of marque and reprisals in consequence of spoils committed on Englishmen in Brittany, *ib.*, p. xix. In 1313 justices are appointed to settle piracy claims made by Flanders, *ib.* p. xix. In 1314 a petition by French merchants who had been spoiled, *ib.*, p. xix. In 1315 several cases of spoil, *ib.*, pp. xx–xxi. In 1316

The climax seems to have been reached in and after 1320, when we meet with complaints from Flemings, Normans, Bretons, Frenchmen, Spaniards, Portuguese, Catalans, and Genoese. But from Edward III's point of view this was by no means the worst, for he had

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the ships of the English Admiral commit spoils, *ib.*, p. xxi. In 1318 a complaint to the king of France of spoil committed by the Admiral of Calais, *ib.*, p. xxi. In 1319, reprisals, *ib.*, p. xvi. In 1319–1320 negotiations between England and Flanders about spoils, the claims being referred to arbitrators appointed by each country, who were to try the cases *selonc la lei et la custume de la terre et la lei marchaunde.* This convention contains the statement that the king of England was lord of the sea and that the piracy was committed on the sea within his power. These special directions were probably given because of the miscarriages of justice in common law courts, *ib.*, pp. xxii–xxiii. In 1321 a treaty with the Duke of Brittany to settle piracy claims by arbitrators, procedure to be *somerement et de plantz, ib.*, p. xxiii. In 1321 and in 1323 complaints to the French king over the capture of an English ship by the French admiral and of the denial of justice, *ib.*, p. xxiii. In 1322 spoil at sea by Flemish pirates, *ib.*, p. xxiii. In 1323 spoil of a ship of Piacenza by one from Bristol, *ib.*, p. xxiv. In 1324–1325 complaints by the king of Aragon of delayed justice in piracy cases, *ib.*, pp. xxiv–xxv. In 1325 robbery at sea by men of Yarmouth, *ib.*, p. xxv. In 1327 an English ship seized and the crew murdered by Frenchmen; reprisals granted to the owners on failure to obtain justice abroad, *ib.*, p. xxv. In 1327 piracy and murder, *ib.*, p. xxv. In 1328 French piracy, *ib.*, p. xxvi. In 1329–1330 negotiations as to French piracy claims, *ib.*, p. xxxiii. In 1333 English goods arrested in France as security for restitution of French goods in litigation in England, whether spoiled or salvaged, *ib.*, p. xxvi. In 1333 difficulties with Castile in consequence of spoils by Englishmen, *ib.*, p. xxvi; Nys, p. 67. In 1334 negotiations as to French piracy claims broken off, *ib.*, p. xxxiii. In 1335 correspondence with the Dukes of Brittany and of Normandy and with the king of France about piracy claims; commissioners appointed to treat with France, *ib.*, p. xxvii. In 1336 negotiations with France continue, *ib.*, p. xxxiii. In 1338 arrest of spoilers of Spanish ships and of Flemish ships, *ib.*, p. xxvii. In 1339 piracies against Spanish, Portuguese, and Catalan merchants, *ib.*, pp. xxviii–xxix. In 1342 spoil of a Flanders ship, *ib.*, pp. xxxvii–xxxviii. In 1343 piracy cases and complaints from the kings of Castile and of Aragon about piracy, *ib.*, pp. xxxviii–xxxix. In 1344–1345, reprisals, *ib.*, p. xvi. In 1347 piracies, one on Spaniards, *ib.*, p. xxxix; Senior, p. 24. In 1349 Spanish ships seized in Plymouth in reprisal for wrongs done men of Plymouth by Spaniards, Senior, p. 22. In 1351 another commission sent to Bruges to deal with piracy claims made by Flanders, *Select. Pleas Ct. Adm.*, I, p. xxxix. In 1352 cases of piracy, *ib.*, p. xxxix. In 1353 the vessels going to Gascony depart in a convoy, Nys, p. 231. In 1353 recapture from pirates, *Select Pleas Ct. Adm.*, I, p. xl. In 1353 the statute 27 Ed. III, st. 2, cap. 13, by which foreign merchants were to have restitution of their spoiled goods without suit at the common law; apparently passed because of the difficulties or failure of the common law courts to do justice in cases of spoil. This statute may possibly have been construed as having given the authorization for the creation of the Court of Admiralty; *ib.*, p. xl. Edward III wisely claimed the sole right to grant letters of marque and of reprisals, Nys, p. 73. Had the various cities also been able to grant such letters the resultant anarchy and confusion would have been indescribable.

felt it necessary to make compensation out of his own pocket to various claimants. Thus, in 1330 he had paid £152 to the Bardi for the spoil of a cargo; in 1336 he had compromised another claim of Genoese merchants by a like payment "out of grace"; in 1338 he had paid Genoese owners compensation for the spoil of a galley; in 1342 he had paid altogether £10,000 to the Genoese for various spoils committed on them; and in 1354 he assigned the duty upon 1,000 sacks of wool as a recompense to Genoese who had been spoiled.[127] When we remember that Edward III was always in an impecunious condition and that in 1339 he had had to repudiate 235,000 marks sterling of debt to the Bardi and the Peruzzi alone,[128] we will understand what an especially strong interest he had in being freed from such involuntary liabilities. The naval victory of Sluys in 1340 left him the temporary master of the sea and in a position to enforce the English claim to the sovereignty of the seas.[129] That he may have been considering the erection of such a court at this time is shown by his consultation, in 1339, with three ecclesiastics (probably learned in the civil law) as to the rules which it would be best for his courts to administer in maritime matters.[130] It was at some time after this date and before 1357, when we have our first record, that he established the Court of Admiralty in order to keep the king's peace on the sea, and to settle such piracy cases promptly and under the royal supervision on the land.[131] "If the court of Admiralty had not arisen in the middle of the fourteenth century, [the] . . . maritime law, whether initiated by the king's Council, or adopted from the usage of our own or of foreign ports, would probably have been worked out into a body of maritime law by the courts of the more important seaport towns. But the rise of that court put an end to the prospect that English maritime law would be developed in this way."[132]

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[127] *Select Pleas Ct. Adm.*, I, p. xxviii. *Select Cases before the King's Council* (Selden Society), p. lxxii.

[128] Goldschmidt, p. 186.

[129] "In their origin these claims [to the sovereignty of the seas] were no doubt founded upon services rendered to commerce. It was to the advantage of a state to secure the approaches to its shores from the attacks of pirates, who everywhere swarmed during the Middle Ages; but it was not less to the advantage of foreign traders to be protected. A right of control became established and recognized. . . . From this, as a dissociation of the ideas of control and property was not then intelligible, the step to the assertion of complete rights of property was almost inevitable. The acts of control, it must be remembered, apart from those required for the protection of commerce, were often not only very real, but quite as solid as those upon which a right of feudal superiority was frequently supported," Hall, p. 145. Apart from the Saxon kings' claims to the dominion of the sea, most of them very doubtful (above p. 264), there seems to be no other record of such a claim until the time of Edward I. In 1297 Edward I made a treaty with Count Guy of Flanders at Bruges, in which the latter acknowledged the English claim to the sovereignty of the seas, *Select Pleas Ct. Adm.*, I, pp. xxxiii–xxxiv. In 1299 there was a commission sitting in Paris to redress damages done to merchants of various nations by a French Admiral within the English seas, and it appears from a memorial there presented that procurators of the merchants and mariners of Genoa, Catalonia, Spain, Germany, Zeeland, Holland, Friesland, Denmark, and Norway acknowledged that excusive dominion over the English seas, and the right of "making and establishing laws and statutes and restraints of arms" and "all other things which may appertain to the exercise of sovereign dominion" over them, were possessed by England, Hall, pp. 145–146. In 1320 the Flemish envoys to settle piracy claims made or assented to the statement that the King of England was lord of the sea and that the piracy was committed on the sea and within his power: "il est seigneur de la mer et la dite roberie fut fait sur la mer dans son poer," *Select Pleas Ct. Adm.*, I, p. xxii. In 1322 Edward II was claiming such sovereignty, for the king of France complains of robberies committed against his ships by English mari-

The Court of Admiralty has therefore always possessed an inherent jurisdiction to adjudicate in a case of piracy as to the restitution of goods taken piratically on the high seas and to condemn the goods belonging to the pirates, to the Crown as droits of Admiralty.[133]

We have already mentioned that the Admiralty was a department of state. It collected its documents together in a book similar to the Red and Black Books of the Exchequer. The *Black Book of the Admiralty* was edited by Sir Travers Twiss in 1871, but the original

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ners "qui se dicunt esse custodes maris ex parte vestra," *ib.*, p. xxxiv. In 1336 Edward III claimed the sovereignty of the sea, *ib.*, p. xxxv. A patent of 1337 styles the king "Lord of the English Sea on every side," and this title is also met much later, in 1420, *ib.*, p. xxxiv. In 1372 a petition to Parliament states that then and previously "touz les pays tenoient et apelloient nostre avan dit seignour le Roi de la mier," *ib.*, p. xxxiv. In 1339 a document addressed to commissioners considering piracy claims from Flanders directs them to remember the maintenance of the king's sovereignty over the English seas, *ib.*, p. xxxiv. In the same year we have the document known as the "Fasciculus de Superioritate Maris," which, in one part, claims that the Admiral of the King of England, and, in his absence, the mariners of England from time immemorial, have had jurisdiction over and have taken cognizance of, trespasses and other matters done upon the English seas, *ib.*, p. xxx. The battle of Sluys in 1340 destroyed the French fleet, gave England naval supremacy, and, temporarily at least, left the claim to the sovereignty of the seas uncontested, *ib.*, p. xxxv. During the XIV, XV, and XVI Centuries England kept the peace of her seas either by cruisers in constant employment or by ships sent out as occasions demanded, Hall, p. 146.

[130] *Black Bk. of Adm.*, II, p. xlii.

[131] *Select Pleas Ct. Adm.*, I, pp. xv, xxxvi.

[132] Holdsworth, *H.E.L.*, V, p. 135.

[133] Coke, Litt. 391a. *Prinston v. The Admiralty* (1615), 3 Buls. 147. *Radly v. Eglesfield* (1671), 1 Ventr. 173. Halsbury's *Digest*, I, p. 76.

volume itself seems to have been compiled in the time of Henry VI by an Admiralty official who made use of a number of older documents,[134] as well as of some which were quite contemporaneous. In all there are eleven documents, of which the last three do not concern the Admiral in any way.[135] The other eight are roughly arranged in chronological succession.

The first two are entitled "Old Rules for the Lord Admiral" and "Instructions for the Lord Admiral in Time of War," and were probably drawn up by the King in Council.[136] From very early times the Navy was managed by the King and the Council, who often summoned experts from the ports to advise them upon maritime matters, and the earliest surviving minutes of the King's Council are concerned with the Navy and the Admiral of the North in 1337.[137] These two documents, for various reasons, cannot have been drawn up before 1337 or after 1351, and there seems to be good reason for placing them in 1338 or 1340.[138] If so, they antedate the establishment of the Court, which seems likely, as it is not mentioned in them. The first document contains regulations with regard to the Admiral and the fleet, the duties, appointments, records, and pay of the Admiral, the sailing order of the fleet, the wages of masters and mariners, and the rules governing prize money.[139] The second is chiefly concerned with articles of war, the sailing order of the fleet, the right of visit and search, prize, discipline over soldiers and mariners, the rules of landing parties, and collision.[140] The third document dates from 1360–1369 [141] and therefore postdates the foundation of the Court. It is entitled "Rules or Orders about Matters belonging to the Admiralty" and sets forth the matters which are to be inquired of by maritime inquests.[142] It is important for our purposes as showing the jurisdiction exercised or claimed by the Admiralty at this period. On the other hand, there are serious grounds for doubting the entire accuracy of certain of the articles. Those which we suspect are articles XVI, XVIII, XXI, and XXV, either in whole or in part. Article XVI treats of the procedure to be followed in the banishment of felons and in the seizure of their goods.[143] Unfortunately, however, it purports to have been made in the time of Henry I (1100–1135) and provides for proceedings before the Admiral, a manifest impossibility. Article XVIII treats of the arrest of ships for the King's service.[144] It purports to have been made by Richard I (1189–1199) and speaks of proceedings before the Admiral and of his court as a court of record, again a manifest anachronism. Article XXI confers jurisdiction over all contracts made beyond seas or within the floodmark on the Court of Admiralty, by an ordinance of King Edward I (1272–1307).[145] All the evidence that we possess goes to show that such a thing is impossible.[146] Articles XXV, XXVI, and XXVII are administrative ordinances purporting to have been made by King John (1199–1216) in the presence of his admirals and to have been committed by him to them for enforcement.[147] These three articles are not subject to so much doubt. We have seen that *Custodia* and *Admirallitas* were equivalent words;[148] further, the duties to be performed by the Admiral are exclusively administrative. There is, therefore, a probability that these duties were originally entrusted to the *custos maris*, and that the copyist in later times substituted the more modern name of the Admiral. Articles XVI, XVIII, and XXI, therefore, cannot be accepted on their historical face at all, and one cannot endorse Sir Travers Twiss' gentle doubt "that the language in which [the ordinances] are entered in the Black Book, may not be the language of the original ordinances."[149] Nevertheless, the articles are of some use to us, for they do prove to us what jurisdiction was claimed by the Court of Admiralty only a few years after its creation. One might almost be inclined to deduce from Articles XVIII and XXI that the court was not originally a court of record and that it lacked commercial jurisdiction, and that it therefore had to bolster up its claim to such a jurisdiction by these means.[150] Certainly all our evidence seems to indicate that the court in its inception was chiefly administrative and disciplinary and that its jurisdiction was confined to cases of violence at sea. Whether or not this be so, we find the court claiming this commercial jurisdiction by 1369. Its further jurisdiction was as follows: theft in port of ropes, boats, anchors; theft from foreigners in ports; common malefactors; no one to take goods and pay what he pleases; trespassers and their security; mayhems; ship's masters to secure malefactors; banishment of felons; arrest of ships for the king's service; contracts; bloodshed below the floodmark; forestallers and regrators; customs; fisheries, mills, and weirs; receivers of stolen goods; false measures, balances, and weights; wrecks, flotsam, jetsam, and lagan; suits brought at common law; deodand; wages of ship's carpenters; transport of grain without license. Inquests into all these matters were made by sworn jurors.[151] It is interesting to compare this with the inquest of the Cinque Ports Admiralty about seventy years later,[152] for there is a great deal of similarity. The article (XXXV) to punish those suing at common law [153] shows us that the jurisdiction of the court is still new.[154] The fourth document is a copy of the Rolls of Oléron, of which we have spoken above,[155] containing the additional articles, and from its position we can infer that it was incorporated before 1375,[156] which is the date of the first eighteen articles of the fifth document, the Inquisition of Queenborough.[157] Fifty-two more articles in the Inquisition date from the reign of Henry IV (1399–1413) [158] and the final eleven date from the reign of Henry V (1413–1422).[159] The earliest group in the Inquisition is only a tariff of wages, with the exception of the final article on prize; the second group is concerned chiefly with jurisdiction and restates the third document in a more ample way, laying special stress on the scope of its own jurisdiction; [160] the final group treats of procedure and of the droits and fees of the Admiral. All the previous documents have been in French, but the sixth is in Latin.[161] It is an unfinished tract upon practice and procedure, following the general principles of the civil law and is entitled the "Ordo Judiciorum"; the author was a civilian who had studied at Bologna and who was familiar with the works of Bartolus.[162]

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[134] *Black Bk. of Adm.*, III, pp. viii–xi.

[135] *Ib.*, I, pp. xxxviii–xxxix.

[136] *Ib.*, I, pp. xli–xlii.

[137] *Ib.*, I, p. xli.

[138] *Ib.*, I, pp. xxx–xxxi; III, pp. x–xi.

[139] *Ib.*, I, pp. 2–23.

[140] *Ib.*, I, pp. 24–39.

[141] *Ib.*, I, p. xxxiv.

[142] *Ib.*, I, pp. 40–87.

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[143] *Black Bk. of Adm.*, I, pp. 56–59.

[144] *Ib.*, I, pp. 64–67.

[145] *Ib.*, I, pp. 68–69.

[146] *Ib.*, I, pp. li–lvi. Sir Travers Twiss found it necessary to answer a number of similar doubts on other grounds over fifty years ago.

[147] *Ib.*, I, pp. 72–77.

[148] *Select Pleas Ct. Adm.*, I, p. xxxv. Above, p. 279.

[149] *Black Bk. of Adm.*, I, p. xlix.

[150] *Select Pleas Ct. Adm.*, I, p. xliv.

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[151] *Black Bk. of Adm.*, I, pp. 40–87.
[152] Above, pp. 270–271.
[153] *Black Bk. of Adm.*, I, pp. 82–83.
[154] Holdsworth, *H.E.L.*, I, p. 545.
[155] Above, pp. 63–67.
[156] *Black Bk. of Adm.*, III, pp. xi–xii.
[157] *Ib.*, I, p. lxxi; pp. 132–173.
[158] *Ib.*, I, p. lxxi.
[159] *Ib.*, I, p. lxxi.
[160] *Ib.*, I, pp. 162–163.
[161] *Ib.*, I, pp. 178–220.
[162] *Ib.*, I, p. 178, n. 2; p. 200, n. 2.

It seems to have been a treatise and it is probable that it was not in use at this period, although it shows us that the Admiralty was already considering the procedure of the civil law.[163] It seems to date from shortly after 1406.[164] The seventh document, "De Officio Admiralitatis," is also in Latin [165] and covers approximately the same ground as the third and the fifth—the matters within the Admiralty jurisdiction about which inquest should be made. It is supposed to date from the time of Henry VI [166] and it has several interesting points. One is the insistence laid upon the jurisdiction of the Admiral; [167] another is that in no place are contracts, charter-parties, or mercantile affairs mentioned; a third is that in actual practice the common law procedure of presentment and inquest was followed in all criminal cases, and that trial by jury was always used.[168] Up to the middle of the XV Century, therefore, the civil law was not in use; in the latter part of the Inquisition of Queenborough, which dates from Henry V, the rule is stated that "a summary and full process is to be made according to the maritime laws." [169] The eighth document is really a series of documents from the time of Admiral John Holland, 1443–1446, [170] being notes and copies of precepts, releases, inquisitions, presentments, letters testimonial, commissions, supersedeases, pardons, committals, etc.[171] The Admiralty papers end with two safe conducts of about 1463–1465.[172] Sir Travers Twiss has also added various appendices.[173] For a collection of rules and precedents assembled over a period of one hundred years, the *Black Book of the Admiralty* is surprisingly meager. Case law is conspicuous by its absence, although one would hardly feel justified in inferring from this that it was not used. On the other hand, it cannot have been greatly regarded.

The jurisdiction of the Admiral was now fourfold: it included civil cases, criminal cases, royal and admiralty droits, and prize, and all these four branches were in use by the end of the XIV Century. First of all we shall speak of the civil cases. In the mediæval period the records of the court of Admiralty are extremely scanty in this respect.[174] By the "Rules or Orders for the Admiralty," which date from 1360–1369, the Admiralty already claimed jurisdiction over charter-parties, obligations, and contracts made abroad or on the high seas.[175] On the other hand, neither of the two later documents, the Inquisition of Queenborough and the "De Officio Admiralitatis," mention such a jurisdiction in any way. Furthermore, we have records of only a few such civil cases. In 1369 there is a suit before the Admiral for breach of a charter-party;[176] in and after 1389 there is *Gernesey c. Henton,*[177] a long drawn out case involving, among other matters, debt and freight; in 1390 there is *Sampson c. Curteys,*[178] partially involving debt; and in 1392 there are appeals in three cases,[179] one a maritime case of debt, one of freight, and one a case of part ownership of a ship. It seems plain, therefore, that the civil jurisdiction of the Admiral was never considerable. This need not surprise us. In the first place, our study of these courts on the Continent has shown us that the merchant and the mariner always preferred to administer their own law according to their own ideas, and that, at the very least, they always had advisory functions in any court. Such was never the case in the English courts of Admiralty in the XIV and XV Centuries. The opinions of the prud'hommes of the sea, of the grave and discreet merchants, were not consulted in England. The Admiral or his deputy sat supreme and applied the law as he saw it. In the next place, the merchant and the mariner wanted a swift and summary justice, and, despite the Inquisition,[180] we shall show below that justice in the Admiralty courts was often slow and technical.[181] The case was not tried and judged on the spot; it might be removed elsewhere, or to London, and the Admiralty courts were few and far between. In respect of all these civil and commercial cases the merchant and the mariner must have found the Admiralty court very unsatisfactory. Finally, large classes of cases were automatically removed from its jurisdiction. The foreign merchants, who were the largest class, had, as we shall see, their own courts;[182] the Cinque Ports, the heart of the English mediæval maritime world, had their own separate and independent Admiralty jurisdiction;[183] and many of the local maritime boroughs were also exempt.[184] With all these disadvantages the jurisdiction of the Admiralty in civil causes could never have been very important. In criminal causes, on the contrary, its jurisdiction was much more important. It was especially for this, as we have seen, that the court was created, and the restraining statutes of Richard II expressly recognized this aspect of the court,[185] which was the outcome of the administrative duties of the Admiral. As early as 1361 the criminal jurisdiction of the Admiral was recognized as being exclusive on the high seas. In that year a commission of oyer and terminer in a case of piracy and murder was recalled by the advice of the Council on the ground that by the common law felonies, trespasses, and injuries done on the sea should be tried before the Admiral by the maritime law and not before the judges by the common law.[186] In the regulations of 1360–1369 the Admiralty expressly claims jurisdiction over homicide, bloodshed, mayhems, and felonies and trespasses generally, and this was reasserted in the articles of the Inquisition which date from 1399–1413[187] and in the "De Officio Admiralitatis" of the time of Henry VI.[188] In 1391 the statute of 15 Richard II, which was generally restrictive of the jurisdiction of the Court of Admiralty, nevertheless enlarged its criminal jurisdiction to include rivers: "nevertheless, of the death of a man, and of a mayhem done in great ships, being and hovering in the main stream of great rivers, only beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers, the Admiral shall have cognizance."[189] We have already mentioned piracy and spoil as being among the chief subjects of the Admiralty jurisdiction.[190] There were also lesser offences: thefts of cables and anchors; customs and staples offences; forestalling and regrating; false measures, weights, and balances; riparian offences, such as mills, stakes, and weirs; and offences connected with the naval duties of the Admiral.[191] The droits of the Crown and of the Admiral [192] are of no great importance for us. They included deodands, flotsam, jetsam, lagan, derelict vessels, valuables found on a man slain or drowned at sea, goods of traitors, wreck, whales, sturgeons, and royal fish; [193] in all these things the King or the Admiral on his behalf took all or a part. Finally, there is the matter of prize. Our earliest documents, those of 1338–1340, mention the subject of prize, provide for the shares of the King and of the Admiral,[194] and further provide that ships captured by the fleet as prize must be brought before the Admiral unpillaged, though this latter regulation seems to be chiefly for the purpose of protecting the Admiral's share.[195] In 1357 the Admiral seems to have decided judicially on the question of prize or no prize.[196] The earliest rules in the Inquisition, of 1375, also refer to the division of prize,[197] as does the part of 1399–1413.[198] The duty of bringing in prizes for adjudication is set forth in a proclamation by Henry V in 1415 [199] and by Henry VI in 1426.[200]

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[163] Holdsworth, *H.E.L.*, V, p. 126.

[164] *Black Bk. of Adm.*, I, p. xxxv.

[165] *Ib.*, I, pp. 221–245.

[166] *Ib.*, I, p. xxxvi.

[167] *Ib.*, I, p. 227.

[168] *Ib.*, I, pp. 245, 222, 223 *et passim.*

[169] *Ib.*, I, p. 168. "Est de faire summaire et plain proces selon loy marisne et anciennes coustumes de la mer."

[170] *Ib.*, I, pp. xxxvii–xxxviii.

[171] *Ib.*, I, pp. 246–275.

[172] *Ib.*, I, pp. 276–280.

[173] *Ib.*, I, pp. 347–472.

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[174] Holdsworth, *H.E.L.*, V, p. 127.

[175] *Black Bk. of Adm.*, I, pp. 68–69.

[176] *Select Pleas Ct. Adm.*, I, p. xlvi.

[177] *Ib.*, I, pp. 17–26.

[178] *Ib.*, I, pp. 1–17.

[179] *Ib.*, I, p. li.

[180] *Black Bk. of Adm.*, I, p. 68.

[181] Below, p. 306.

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[182] Below, p. 347.

[183] *Select Pleas Ct. Adm.*, II, pp. xxi–xxii.

[184] *Ib.*, I, pp. xiii–xiv.

[185] 15 Richard II, c. 3.

[186] *Select Pleas Ct. Adm.*, I, p. xlv. "Esse consonum dictæ legi et consuetudini quod feloniæ transgressiones seu injuriæ super mare factæ non coram Justiciariis nostris ad communem legem sed coram Admirallis nostris juxta legem marittimam deducantur et terminentur."

[187] *Black Bk. of Adm.*, I, pp. 148–169, *passim.*

[188] *Ib.*, I, pp. 221–222, 230–231.

[189] 15 Rich. II, c. 3.

We must now consider the procedure followed in the Courts of Admiralty. In theory, at least, that procedure was to be like that of the courts on the Continent and the local courts in England; [201] it was to be summary, plain, and devoid of technicality,[202] and we instance as characteristic the regulations for the Admiral's lieutenant-general, of about 1412–1426:[203] he "shall make oath to the high admiral to do right and due justice to all manners of parties complaining in the court of Admiralty, as well to plaintiffs as to defendants, without having to do more for one party than the other, and he ought to make summary and hasty process from tide to tide, and from hour to hour, according to the law marine and ancient customs of the sea, without observing the solemnity of the law, and without mixing law civil with law maritime there where it may be equitable, knowing the right of the parties." In actual practice, however, the proceedings do not seem to have been nearly as prompt as this rule would indicate. In the matter of the actual trial itself the procedure does not seem to have been far removed from the common law. The quotation that we have just given does not contemplate any infusion of the civil law in the adjective law, but only in the substantive law, and there is no evidence to show that the unfinished treatise on the procedure of the civil law, which is found in the *Black Book*,[204] was ever put into use. Undoubtedly the Court of Admiralty was looking towards the civil law,[205] but it does not seem to have adopted it officially during this period. There are only two pieces of testimony to the contrary, one being the petition of 1371 to Parliament, complaining of trials in the Admiralty without a jury.[206] To this the Inquisition of Queenborough was probably the answer, settling the jurisdiction of the Admiral.[207] The other was the petition of the towns of the southwest in 1394, to which we shall make further reference below, which speaks of the "diverse delaies de la ley de Civill."[208] At a glance this would seem to be difficult to explain, but when one remembers that at this very time the "Admiral of the West seems to have held a court of independent jurisdiction within his own Admiralty,"[209] one can understand that his individual alteration of the existing system by introducing the civil law would naturally have provoked a vigorous protest. As a matter of fact, this protest strengthens our belief that the civil law cannot have been generally introduced or else we should have had many other

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[190] Above, p. 266.

[191] *Black Bk. of Adm.*, I, pp. 40–87; 132–173; 221–242, *passim.*

[192] *Select Pleas Ct. Adm.*, II, pp. xxiv–xxxii, xxxvii.

[193] As in note 191, above, *passim.*

[194] *Select. Pleas Ct. Adm.*, II, pp. 20–23.

[195] *Ib.*, pp. 28–31.

[196] Rymer, *Fœdera,* VI, 14.

[197] *Select. Pleas Ct. Adm.*, II, pp. 134–135; 144–147. A half of each prize was granted to the mariners as far back as King John, *Rot. Pat.* 5 John, 51.

[198] *Ib.*, pp. 150–151.

[199] *Black Bk. of Adm.*, I, pp. 414–419.

[200] Rymer, *Fœdera,* V, 376.

[201] *Black Bk. of Adm.*, II, pp. 22–23. Doomsday of Ipswich: "the plees yoven to the lawe maryne, that is to wite, for straunge marynerys passaunt and for hem that abydene not but her tyde, shuldene ben pleted from tyde to tyde."

[202] *Ib.*, I, pp. 168–169. Inquisition of Queenborough: "To doe right and to doe justice to all parties as well plaintiffes as defendants in the Court of Admiralty. A summary and full proces is to be made according to the maritime laws."

[203] *Black Bk. of Adm.*, I, pp. 408–409.

[204] *Ib.*, I, pp. 178–220.

[205] Holdsworth, *H.E.L.*, V, p. 126.

[206] *Select Pleas Ct. Adm.*, I, p. xlvii.

[207] *Ib.*, p. xlviii.

[208] *Rot Parl.*, III, 322 (17 Rich. II, no. 49).

[209] *Select Pleas Ct. Adm.*, I, p. 2. *Select Cases before the King's Council* (Selden Society), p. xxviii.

such protests.[210] The statutes of 1389,[211] 1391,[212] and 1401 [213] were all passed to define and to limit the Admiralty jurisdiction, and it is likely that if the civil law had been in use by the Admiralty at that time we should have heard a good deal of complaint about it.[214] However, we have definite evidence later that the civil law was not in use and we can see quite definitely that in criminal cases the preliminary common law procedure of inquest and presentment was followed, and that in both civil and criminal matters a trial by jury was in use. In the documents connected with the Admiralty of Sir Thomas Beaufort, from 1412–1426, are two mandates, one to the sheriff of Kent,[215] and the other to certain commissioners in Bristol,[216] to impanel a jury of twenty-four captains, seamen, and merchants in order to make inquiries and presentments. Under the Admiralty of John Holland, Duke of Exeter, 1443–1446, we have four such precedents,[217] while three of the nine documents contained in the *Black Book,* the "Rules or Orders about Admiralty Matters" [218] of 1360–1369; the Inquisition of Queenborough [219] of 1375–1422, and the "De Officio Admiralitatis" [220] of the time of Henry VI, were especially drawn up to guide such inquiries. Trial by a jury of twelve is specifically mentioned both in the XIV and in the XV Centuries in the trial of piracy; and in the trial of treason by a jury *secundum legem maritimam* before the Admiral in 1370 under a commission of oyer and terminer, the jury being composed half of foreigners since the defendant was a foreigner; [221] and in the Beaufort mandate to Bristol, commanding that the subsequent trial be by jury of twelve merchants and mariners.[222] At the end of the "De Officio Admiralitatis" it is provided that trials shall be by a jury of twelve [223] and this document gives us our most complete information as to trials. Further, article after article in the "De Officio" provides that conviction must be *per duodecim*. As late as 1427 a case was tried before the Admiral with a petit jury, following presentment found by a grand jury.[224] There is one case mentioned of a special jury, where a felony was committed aboard a foreign ship in port[225] and the criminal was unknown. In such a case six or eight native jurymen are to be chosen together with four mariners from the ships in port, and ships' officers, if necessary, to complete the jury, in order to ascertain the criminal. "It is not known when trial by jury ceased in the Admiralty."[226] The law administered in these Admiralty courts may have had some small infusion of Roman law,[227] as we have seen. The case of *Rex v. Well,* tried in 1445, shows us that the laws of Oléron were also pleaded in the court at that time, for the defendant was indicted for acting *contra leges maritimas et statutum de Oleron.*[228] Even at this time all the various courts, as we have shown,[229] recognize that the law maritime and the merchants' law were something distinct and apart from the common law, and all the courts used the phrases *secundum legem maritimam,* or *mercatoriam.*[230] In a protocol of appeal of 1410 the decision appealed from is stated to be *contra legem maritimam ac statuta et consuetudines in curia admirallitatis Angliæ.*[231] The language in use in the courts at this time was French,[232] and French was the language of seafaring men in the time of Edward III.[233] The form of pleadings was not that of the civil law. There was no *libellus, allegatio,* or *positiones* but, instead, a *billa, responsio, duplicatio,* a further *responsio,* a *triplicatio,* and a *quadruplicatio.*[234] The existence of lawyers practising in these courts is shown by the record of a suit in 1430 before the Admiral's deputy in Norfolk and

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[210] Senior, p. 49.

[211] 13 Rich. II, st. I, c. 5.

[212] 15 Rich. II, c. 3.

[213] 2 Hen. IV, c. 11.

[214] Holdsworth, *H.E.L.,* V, p. 126.

[215] *Black Bk. of Adm.,* I, pp. 347–348.

[216] *Ib.,* I, pp. 378–380.

[217] *Ib.,* I, pp. 255–258; 267; 269; 273–274.

[218] *Ib.,* I, pp. 40–87.

[219] *Ib.,* I, pp. 132–173.

[220] *Ib.,* I, pp. 221–245.

[221] *Cl.* 43 Edw. III, m. 4.

[222] *Black Bk. of Adm.,* I, pp. 378–380. See also a case of 1370 in *Select Pleas Ct. Adm.,* I, pp. xlvi–xlvii.

[223] *Black Bk. of Adm.,* I, p. 245. "Porrecto libello, et eidem responso negative per partem ream, de consuetudine judex potest procedere ad decidendum causam per patriam, dummodo per partes hincinde posuerint se de concesso in juratam,

et tunc judex decernat mandatum emanare, de venire faciendo duodecim probos et legales homines de vicineto parcium predictarum, rei noticiam et melius obtinentes, certis die et loco judiciali coram eo ad dicendum inter partes, quitquid eis constiterit, et super veredictum dictorum duodecim debet judex conferre sententiam."

[224] *Select Pleas Ct. Adm.,* I, pp. liii–liv.

[225] *Black Bk. of Adm.,* I, p. 238.

[226] *Select Pleas Ct. Adm.,* I, p. liv.

[227] Senior, p. 23. "A little blending of Prætorian equity with Oleronian law."

[228] *Black Bk. of Adm.,* I, p. 255.

[229] Above, pp. 273–278, 283–284.

[230] *Select Pleas. Ct. Adm.,* I, pp. xiii; xvi; xxiv; xliii, n. 1.

[231] *Black Bk. of Adm.,* I, p. 369.

[232] *Select Pleas Ct. Adm.,* I, p. l.

[233] *Black Bk. of Adm.,* I, p, lvi, n. 2.

[234] *Select Pleas Ct. Adm.,* I, pp. 1–17.

Suffolk; the defendant "could not find a counsel there, and the admiral accordingly revoked the case to his principal court at Southwark near London, where counsel are in plenty." [235]

We must now speak of the organization of the Court of Admiralty. We have already mentioned that in 1360, for the first time, the command of the three fleets of the North, South, and West was given to a single Admiral, and that he was also granted maritime jurisdiction and the power to appoint a deputy, doubtless as a judge; further, that similar patents are to be found in 1361, 1386, 1398, and 1399.[236] There was also a sub-Admiral,[237] and we meet Admirals of the North and of the West again, and, in fact, until the commencement of the XV Century there appears to have been no High Court of Admiralty but only the local courts of these Admirals.[238] In 1364 a jury made presentments before a sub-Admiral who had jurisdiction to inquire of all "felonies, trespasses, and other misdeeds along the shore of the sea." [239] In 1370 there are apparently several courts coördinate to one another, since, in the absence of the Admiral of the West, the King orders a trial to be held before the Admiral of the North.[240] In 1389 the Earl of Huntingdon was Admiral of the West and his deputy judge appears to have committed many irregularities.[241] At this period the court may have been itinerant, for proceedings were held at Lostwithiel and at Fowey and at other places in the West and then adjournment was made to London,[242] far distant from the place where the cause of action arose and far distant from the homes of the witnesses and the parties. This was naturally a cause of grievance [243] and of heavy expense, and complaint was made of it to the King and to Parliament.[244] In consequence of such incidents the two statutes of Richard II, to which we have already made reference, were passed, restraining the jurisdiction of the Admiral.[245] In 1405, 1406, and 1408 there are Admirals of all England.[246] One cannot say exactly when the courts of the Admirals of the North, West, and South ceased to function, but it was probably at this period,[247] for a single court, the *Curia Principalis Admirallitatis Angliæ,* was established for the first time early in the XV Century.[248] The first patent that we have of a judge of this court, is dated many years later, in 1482.[249] The lieutenants of the Admiral had no power to try cases involving the loss of life or limbs without a special order.[250]

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[235] *Cal. Pat. Rolls,* July 18, 1430.

[236] Above, pp. 283–284.

[237] *Select Pleas. Ct. Adm.,* I, pp, xliii, xlvi.

[238] Marsden, *Law and Customs of the Sea,* I, p. xiii.

[239] *Select Pleas Ct. Adm.,* I, p. xlvi.

[240] *Ib.,* I, p. xlvii.

[241] *Ib.,* I, p. l.

[242] *Ib.,* I, pp. 1–2, 17–20.

[243] *Select Cases before the King's Council* (Selden Society), p. xxviii.

[244] Cf. *Rot. Parl.* 4 Hen. IV, n. 47; 11 Hen. IV, n. 61.

[245] *Select Pleas Ct. Adm.,* I, p. l.

[246] *Ib.,* pp. li–lii. But in 1406 there was still an Admiral of the South, *ib.,* II, p. lx.

For many years the officers known as Conservators of Truces had been appointed by the King, who usually named the Admirals,[251] but in 1414 the Statute of Truces was passed, and it permitted the Admiral to appoint Conservators in some of the seaport towns.[252] In part, their functions were to inquire into and to adjudicate upon piracy cases, which, during the XV Century, were mainly determined by the Conservators or by commissioners with similar powers. All captors of prizes were required to bring them into port for adjudication,[253] showing that the Conservators were intended to exercise a sort of prize jurisdiction—an indication that in this respect the Admiralty was already breaking down. In fact, prize cases seldom came before the Admiralty,[254] and in 1413 arbitrators had had to be called in to decide a case of prize for the Admiral.[255] Like the lieutenants of the Admiral the Conservators had no power of death, such capital cases being reserved for the Admiral.[256]

At first there was some irregularity as regards appeals made from the courts of Admiralty, but by the early XV Century a definite rule seems to have been established. Appeals lay from the courts of the deputies to the central and principal court in London, and an appeal lay from this court to the King in Chancery, the King appointing special deputies to hear each appeal, called *judices delegati.*[257] Our earliest records of appeals begin at the end of the XIV Century in the reign of Richard II,[258] and they are appeals from the principal court, because of which the records are in the form of commissions appointing judges delegates to hear the appeals. They are concerned with debt, trespass, spoil, the jurisdiction of the Admiral himself, freight, and part-ownership of a vessel, and three of them date from 1392.[259] In 1390 *Sampson c. Curteys* was removed from the Court of Admiralty and brought into Chancery by a writ of certiorari.[260] In 1394 the appeal in *Copyn c. Snoke,* which we have mentioned above,[261] finally came from the Admiralty to the King, who appointed judges to hear the appeal.[262] In 1396 there was an appeal from the Admiralty for which judges delegates were appointed, and the same also in 1403.[263] In 1404 *Gernesey c. Henton* was removed from the Admiral's Court into Chancery by a writ of certiorari.[264] In 1406 an appeal was made from the judge of the Admiral of the South to the Admiral, who refused to hear the appeal; further appeal was made to the King, who appointed judges delegates to hear it.[265] In 1407 *Davy c. Browne* was removed into Chancery on a writ of certiorari.[266] It was an action for breach of contract and for trespass, originating in 1401, and it may have been the cause of the passing of the statute of 1401,[267] giving remedies to those wrongfully sued before the Admiral, and also of the establishment of the principal court to hear appeals from the district courts.[268] In 1410 we have the text of a protocol of such an appeal, from the deputy of Sir Thomas Beaufort to the Admiral himself,[269] and in 1411 we have letters of proxy giving a proctor the right to appeal in the name of the appellant.[270] In 1415, 1417, and 1425 there are commissions of judges delegates appointed to hear appeals. [271] In 1452 there is another commission in a case where the judge of the Admiral proceeded in defiance of a supersedeas which issued out of Chancery, based upon the limiting statutes of Richard II and Henry IV.[272] These appeals were sometimes very protracted.[273]

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[247] *Select Pleas Ct. Adm.,* I, p. lxxx.

[248] *Ib.,* I, p. lii.

[249] *Pat.* 22 Ed. IV, pt. 1, m. 2.

[250] *Black Bk. of Adm.,* I, p. 238. "Et nota, quod locatenentes admiralli non possunt vitam et membrum triare sine speciali mandato."

[251] *Select Pleas Ct. Adm.,* I, p. lii.

[252] 2 Hen. V, st. 1, c. 6.

[253] Desjardins, p. 94. Nys, pp. 214, 260.

[254] Marsden, *Law and Customs of the Sea,* I, p. xiv.

[255] *Ib.,* p. xv; pp. 124–126.

[256] *Select Pleas Ct. Adm.,* I, p. lii.

[257] *Ib.,* p. lxxix.

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[258] *Select Pleas Ct. Adm.*, I, p. li; II, p. lix.

[259] *Ib.*, I, p. li.

[260] *Ib.*, p. l.

[261] Above, p. 278.

[262] *Select Pleas Ct. Adm.*, II, p. lix.

[263] *Ib.*, II, pp. lix–lx.

[264] *Ib.*, I, p. 17.

[265] *Ib.*, II, p. lx.

[266] *Ib.*, II, pp. lx–lxi.

[267] 2 Hen. IV, c. 11.

[268] *Select Pleas Ct. Adm.*, II, p. lxi.

[269] *Black Bk. of Adm.*, I, pp. 368–371.

[270] *Ib.*, I, pp. 371–373.

[271] *Select Pleas. Ct. Adm.*, II, p. lxi.

At this period the evidence and the authorities [274] agree that the Admiralty was a court of record, contrary to the not too scrupulous opinion of Coke and others in the XVII Century.[275] The "Rules and Orders about Admiralty Matters" in the *Black Book,* which we have said date from about 1360 to 1369, contain the apocryphal claim that the Admiralty was a court of record in the time of Richard I, but definitely assert that the Admiralty *is* a court of record.[276] The historical falsehood may have been thought to be necessary in view of the novelty of the claim, but the fact itself remains. In 1364 there was a writ of supersedeas to justices on the ground that the case before them had been dealt with by the court of the Admiral, and the record of the proceedings before him is mentioned in the writ.[277] "It appears, therefore, that at this date his court was recognized by the courts at Westminster as a court of record." [278] Again in 1364, in 1369, and in 1370 the record of the court is cited and accepted in the King's Bench, in the court of the sheriffs of London, and before commissioners of oyer and terminer.[279] In 1390 the record of *Sampson c. Curteys* [280] and in 1404 the record of *Gernesey c. Henton* [281] show that the court was a court of record. In 1445 and 1446 we possess letters testimonial of the acquittal of persons indicted and tried before the Court of Admiralty,[282] letters in support of which there can be no doubt that the records of the court would have been adduced had any question been made. In the XIV and XV Centuries, therefore, the Admiralty was a court of record.

Both in the XIV and in the XV Centuries the history of the young Court of Admiralty was really bound up with the many conflicts in which it was engaged, sometimes with the courts of common law, more often with the towns and the local maritime courts, and even with itself, for in 1401 the lieutenant of the Admiral of the West reversed a judgment previously given by the deputy of the Admiral of England.[283] The chief conflict of the Admiralty Courts at this time seems to have been not so much with the common law courts as with those of the local towns, and no doubt the Admiralty was always fundamentally unpopular among the semipiratical population whose activities in making captures at sea its jurisdiction had been set up to restrain.[284] It was characteristic, in and after the XIV Century, of the growth of the royal central courts that they endeavored to swallow up the local jurisdictions.[285] The Admiralty also made this attempt, but in its earlier years it found the local jurisdictions too firmly entrenched. Its own encroachments were restrained by statutes, and so the local courts survived into the XVI Century.[286] The struggle was spread over most of our period, the towns gaining their exemption either by charter, grant, statute, or exception made in the Admiral's patents.[287] Those whose business was most important and would have been most profitable to the Admiral, had he been able to secure it, the Cinque Ports, always were able to maintain their independence.[288] The local courts of many places, such as London, Bristol, Ipswich, and Yarmouth, considerably antedated the establishment of the Court of Admiralty;[289] Colchester was always exempt, Harwich was exempt,[290] and Dartmouth, though never expressly exempted, always resisted the authority of the Admiral strenuously.[291] Newcastle-on-Tyne had had a maritime court since the time of Henry II.[292] Chester claimed Admiralty jurisdiction under a charter of 1341, granting the city jurisdiction over the waters of the Dee, although no express reference is made to Admiralty jurisdiction in the charter.[293] In 1357 the Warden of the Cinque Ports was making inquiry into customs, always an Admiralty subject at this period.[294] It will thus be seen that the young Court of Admiralty entered a field already somewhat occupied. Among its earliest regulations of 1360–1369 was a provision to safeguard its own jurisdiction as regarded those suing at the common law.[295] In 1361 a commission oyer and terminer was recalled on the advice of the Council that by the common law felonies, trespasses, and injuries done at sea ought to be tried before the Admiral and not at common law.[296] In 1371 there was presented to Parliament a petition complaining of the decay of the navy, and of the grievances of merchants and of mariners, and stating that many people had been constrained to plead otherwise than upon the presentment of a jury according to the common law; this probably refers to the new procedure of the Admiralty.[297] "There are about this period other indications of an uncertainty upon questions as to the law and practice in the Admiral's Court, such as would be likely to arise upon the transfer of jurisdiction from the common law courts to a new tribunal." [298] Wreck was for some time one of the disputed subjects—a case in 1362 was tried at common law, cases in 1365 were tried before the Admiral, and a case in 1377 was tried at the common law again—but it properly belonged to the common law and the interference of the Admiral in such cases was prohibited by the statutes of Richard II.[299] In 1374 a commission of oyer and terminer issued to the Warden of the Cinque Ports, the Chief Justice, and others to try piracy by the common and the maritime law.[300] In 1383 the maritime court of Padstow asserted, and gave evidence to support the assertion, that it was independent of the Court of Admiralty, but no decision was made in the case.[301] At the same time the King's Council kept a watchful eye on the actions of the Court of Admiralty and seemed to be distrustful of its judicial capacities. "It was quick to interfere with the admiralty by orders to stay proceedings; sometimes it dictated to the admirals, leaving them little independence of judgment; on one occasion it summoned the admirals to answer for their conduct. A case was heard in 1386 wherein the admirals were made defendants of their conduct in rendering a judgment, which was then reversed by a decision of the council." [302] There must have been many enchroachments of which all record has vanished, since in 1389 the statute 13 Richard II. St. I, c. 5, recites, "Moreover because of great and common clamour and complaint hath been often times made before this time, and yet is, for that the Admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office . . . to the prejudice of the common law of the kingdom . . . it is granted that the admirals and their deputies shall not meddle from henceforth with anything done within the realm, but only of a thing done upon the sea, as it hath been used in the time of King Edward [III]." This apparently had but little effect, since in 1390 an appeal is taken from a decision of the deputy of the Admiral of the West concerning a bond made "far inland and nowhere near the sea coast." [303] In 1390 we also have the earliest English navigation act. Parliament forbade all English merchants to load in any save English vessels thenceforth, but there were evidently not enough vessels, and in 1391 the act was repealed and the rule was modified to read that English merchants, when they were in foreign ports, might load in foreign vessels if they could not obtain English ones.[304] In 1391 there was passed the statute of 15 Richard II, c. 3, limiting the Admiral's jurisdiction precisely: "of all manner of contracts, pleas and quarrels, and all other things rising within the bodies of the counties, as well by land as by water, and also of wreck of the sea, the Admiral's court shall have no manner of cognizance, power nor jurisdiction . . . nevertheless, of the death of a man, and of a mayhem done in great ships, being and hovering in the stream of great rivers, only beneath the bridges of the same rivers nigh to the sea,

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[272] *Select Pleas Ct. Adm.,* p. lxii.

[273] *Senior,* p. 53.

[274] *Select Pleas. Ct. Adm.,* I, p. xlv. Holdsworth, *H.E.L.,* I, pp. 547, 558–559.

[275] Holdsworth, *H.E.L.,* I, pp. 553–554; V, pp. 159–160. Also *Sparks* v. *Martyn* (1668), 1 *Ventris* 1. *Parre* (*Pane*) v. *Evans* (1663), 1 Keb. 500, 552.

[276] *Black Bk. of Adm.,* I, pp. 66–67.

[277] *Cor. Reg., Mich.,* 37 Ed. III, rot. 48.

[278] *Select Pleas Ct. Adm.,* I, p. xlv.

[279] *Ib.,* pp. xlvi–xlvii.

[280] *Ib.,* pp. 1–2. Can this have been the case to which Sir Travers Twiss refers, *Black Bk. of Adm.,* I, p. 67, 1, when he agrees that the Admiralty was a court of record at this period?

[281] *Select Pleas Ct. Adm.,* I, pp. 17–18.

[282] *Black Bk. of Adm.,* I, pp. 253–258.

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[283] *Cal. Pat. Rolls,* June 14, 1401.

[284] Marsden, *Law and Customs of the Sea,* I, p. xiii. On this unpopularity see also Abbott, *Law of Merchant Ships and Seamen,* 14th ed., p. 282.

[285] Holdsworth, *H.E.L.,* V, p. 151.

[286] *Select Pleas. Ct. Adm.,* II, pp. xix–xxi.

[287] Above, pp. 268–269.

[288] *Select Pleas. Ct. Adm.,* II, p. xxii.

[289] Above, p. 269. Also *Select Pleas Ct. Adm.,* I, p. xiii.

[290] *Select Pleas Ct. Adm.,* II, p. xx.

[291] *Ib.,* p. lxi.

[292] *Ib.,* p. xxi.

[293] *Ib.,* p. lviii.

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[294] *Select Pleas Ct. Adm.*, p. lviii.

[295] *Black Bk. of Adm.*, I, pp. 82–83. "Lett inquiry be made concerning all those whoe doe sue any merchant, marriner, or other person whatsoever at common law of the land for any thing of auntient right belonging to the maritime law, and if anyone is thereof indicted and convicted by twelve men hee shalbe fined to the king for his unlawfull and vexatious suite, and besides shall withdraw his suite from the common law and shall bring it in the admiralty court, if hee will prosecute any further."

[296] *Select Pleas. Ct. Adm.*, I, p. xlv. Marsden, *Law and Customs of the Sea*, I, pp. 84–89. "After this date the trial of robbery and murder at sea in the King's courts of common law either ceased altogether or became very rare," *ib.*, pp. xi–xii.

[297] *Select Pleas. Ct. Adm.*, I, p. xlvii.

[298] *Ib.*, p. xliv.

[299] *Ib.*, pp. xliv–xlv.

[300] Marsden, *Law and Customs of the Sea*, I, pp. 99–102: "secundum legem et consuetudinem regni nostri Anglie et legem maritimam."

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[301] *Select Pleas Ct. Adm.*, I, pp. xlix–l.

[302] *Select Cases before the King's Council* (Selden Society), p. xxix.

[303] *Cal. Pat. Rolls*, December 12, 1390.

[304] Desjardins, p. 74.

and in none other places of the same rivers, the Admiral shall have cognizance." On the other hand, the local courts were also asserting themselves against the Admiral, for in this same year the Admiral of the South and West complained to the King of the encroachment on his jurisdiction by the Mayor and Sheriffs of London, and the King appointed the Bishop of London and others as a commission to make inquiry and to report, in order that a remedy might be provided.[305] But in the years 1389–1394 matters were going very poorly in this same Admiral's local jurisdiction, one case going through twenty-nine sittings[306] and another through eleven,[307] neither one being then decided and the places of trial having been changed several times, so that the Chancery finally had to assume jurisdiction to settle them. In 1393–1394 a hapless litigant sued for non-payment of freight arising out of a breach of a charter-party entered into at Bordeaux, trying successively and without redress the courts of common law, of the Admiralty, and of the Constable and Marshall, at last appealing to the King, who appointed judges delegates.[308] We are not surprised, therefore, that "from 1389 to 1409 not less than 8 petitions against the admiral were presented to Parliament,"[309] or that in 1394 the towns of Barnstaple, Bridgewater, Bristol, Exeter, and Wells complained of the encroachments on their franchises and of the errors and delays in the court of the Admiral of the West. Pleas, these towns complained, are unlawfully heard, and appeals have been in suspense for three years and over, "pur diverse delaies de la ley de Civil, et subtill ymagination de les parties pleintiffs"; they speak of "erroignes juggements, appele a l'audience du Roy."[310] And so in 1400 there was passed another statute ordaining that a defendant wrongfully sued in the Courts of Admiralty should have a right of action for double damages against the man who impleaded him there, and reaffirming the statute of 1389.[311] In the further articles of the Inquisition, drawn up between 1399 and 1413, the Court of Admiralty nevertheless tenaciously reaffirms its claim of general jurisdiction and presents for inquiry those who sue at common law and the judges who hold pleas contrary to the privileges of the court.[312]

[305] *Select Pleas Ct. Adm.*, II, p. lix.

[306] *Gernesey c. Henton, ib.*, I, pp. 17–26.

[307] *Sampson c. Curteys, ib.*, I, pp. 1–17.

[308] *Select Pleas Ct. Adm.*, II, p. lix.

[309] Williams and Bruce, p. 6, citing the argument of Sir Leoline Jenkins.

[310] *Rot. Parl.*, III, 322.

[311] 2 Hen. IV, c. 11; repealed, 24 Vict., c. 10, Sec. 31.

[312] *Black Bk of Adm.*, I, pp. 162–163.

But the local courts were equally jealous of their own jurisdictions and had similar provisions. In 1401 a plaintiff in a maritime case brought at common law was fined by the Admiralty of the Cinque Ports for not suing there.[313] Similarly there were provisions in the XV Century statutes of Sandwich and of Fordwich practically compelling people to use the seamen's court in maritime matters by permitting the judges to be hostile if the cases were brought elsewhere.[314] In 1403 Bristol was expressly exempted from the jurisdiction of the Admiral,[315] and in the same year a petition was sent to Parliament asking for the enforcement of remedies against the Admirals and their deputies, complaining of their procedure, and requesting that "the Admiral and his lieutenants do sit and keep their court in no liberty or town, but only upon the sea coasts and arms of the sea," and that their substantive law be confined to the laws of Oléron, and of the sea, and of England, and that neither custom nor other laws be admitted.[316] In 1409 there was another petition to restrain the courts of the Constable and Marshal, and of the Admiral, from taking cognizance "des choses triables par le commune ley," and asking that the justices of the peace be given power to inquire into the doings of the Admirals and of their deputies.[317] In 1411 the deputy of the Admiral of England was presented at an inquisition of the Cinque Ports for entering their jurisdiction and seizing a vessel as a droit of the Admiral.[318] In the further articles of the *Black Book,* drawn up in the time of Henry VI, it is still provided that those suing on a maritime cause outside the jurisdiction of the Admiral shall be fined and compelled to bring their suit before him.[319] The drift towards local independence of the Admiralty continued, Southampton receiving a grant of Admiralty jurisdiction in 1445.[320] In the following year the Admiralty adopted a more independent tone and tried a case relating to a breach of a contract made at Salisbury, disregarding a supersedeas out of Chancery, but the defendant appealed to the

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[313] *Select Pleas Ct. Adm.,* II, p. lx. See also *ib.,* p. xxix, for a similar presentment.

[314] Bateson, II, pp. 193–194. "Solent ipsi major et jurati respicere maliciam ejus in quo est culpa placiti, ita ut pejus expediat in negocio suo."

[315] *Select Pleas. Ct. Adm.,* II, p. xx. The charter of Henry VI in 1446, confirming this, is given in full in Bickley, II, pp. 206–210.

[316] *Rot. Parl.,* III, 498.

[317] *Rot. Parl.,* III, 642.

[318] *Select Pleas Ct. Adm.,* II, p. xxii.

[319] *Black Bk. of Adm.,* I, p. 227.

[320] Raikes and Kilburn, p. xxxii.

King, who appointed judges delegates to hear it.[321] Rochester claimed to have been exempt from the jurisdiction of the Admiral from the time of Edward IV (1461–1483),[322] Yarmouth also claimed a similar exemption at this time,[323] and Tynemouth in 1507.[324] Furthermore, the prize jurisdiction was parcelled out in 1426 by an ordinance which permitted suit to be brought either in the Admiralty or before the Council or the Chancellor.[325] From these facts it will be seen that the jurisdiction of the Admiral was never general, nor widely extended, nor undisputed; that his attempts at encroachment were vigorously resisted by the local courts; and that in the XV Century there was a considerable tendency towards the narrowing of his jurisdiction by the withdrawal from it of a number of the local courts.

In connection with these conflicts we must also speak briefly of the lack of efficiency of the Court of Admiralty. The working of the Admiral's court was not satisfactory in the XV Century and until the Tudor period it was not an active court, as even the scantiness of our records permits us to see. Nor was it an efficient court until the second half of the XVI Century.[326] The reasons for this were various and we have touched lightly on some of them before. In the first place, the Admiralty never had as wide a jurisdiction over persons or over classes of cases as did the Continental maritime and commercial courts which we have studied. As regards persons, the larger and economically more important group of foreign merchants never fell within its jurisdiction until a later period,[327] so that the Admiralty was deprived of a most profitable source of business and remained in a commercial backwater. In the maritime field the most important group of English seaports,[328] the Cinque Ports, were also independent of its jurisdiction,[329] and other important places, of which Bristol, Southampton, Harwich, and Yarmouth will serve as examples,[330] also freed themselves from the authority of the Admiral, so that here, too, the scope of the Court was greatly limited and it had to compete with all these separate and coördinate local courts. Part of the early inefficiency of the Court was almost inevitable. It was faced by the suspicion and by the regulation of Parliament, as well as by the suspicion and by the opposition of all the local towns. We have been at some pains to show that the common law procedure was followed, in the main, by the Courts of Admiralty, for we believe it to be of great importance for the history of the Court and we attribute to it, more than to any other single cause, the failure of the Court to become of importance.

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[321] *Select Pleas Ct. Adm.*, II, p. lxii.

[322] *Ib.*, I, pp. 125–126.

[323] *Ib.*, p. xiv, citing a letter of Edward IV as to usurped Admiralty jurisdiction of Norfolk and Suffolk towns. Landsdowne MSS. Br. Mus. 171, fo. 186.

[324] *Select Pleas Ct. Adm.*, II, p. xix.

[325] Rymer, *Fœdera*, X, p. 367. Marsden, *Law and Customs of the Sea*, I, p. 117.

[326] *Select Pleas Ct. Adm.*, I, p. lii. Holdsworth, *H.E.L.*, I, pp. 546, 549.

[327] Below, p. 347.

[328] Marsden, *Law and Custom of the Sea*, I, p. viii.

[329] Above, p. 270.

[330] Above, p. 303.

For the purposes of the merchant and of the mariner the common law procedure, with its inquests and its indictments, its formal papers, and its proceedings, its attorneys, its appeals, and its delays,[331] was most unacceptable. And yet Parliament and the towns set themselves firmly against the introduction of the civil law,[332] and a much later proposal of 1566, which took its phraseology quite literally from the Continental legal practice of the XIV Century[333] and planned to give the Court authority to decide "summarie et de plano et sine strepitu et figura judicii, sola facti veritate inspecta, omnique appellatione remota,"[334] quite failed of adoption. No one who has so much as glanced at the history of the maritime and the commercial law as administered during the Middle Ages, whether on the Continent or in the local courts of England, can fail to be impressed by the tremendous unanimity of the litigants in desiring a swift and equitable justice administered by themselves, three points no one of which was ever true in the early English Court of Admiralty. On the other hand, all three were true in the early English local courts which, if we may make a deduction from our study of the history of the similar Continental courts, would probably have grown to occupy a similar position had they not hamstrung themselves by their primitive and insular dislike of foreigners. Among all the requirements of the law of commerce, the greatest was always for a swift procedure, wherein the Admiralty was greatly at fault. Even today, when our commercial and maritime courts are slower than in the Middle Ages, and when a swift and a summary justice is an ideal not yet attained, we do not permit a case to drag on for fifteen years and still remain undecided, but this actually happened in the Admiralty at the end of the XIV Century,[335] while another case dawdled on for fifteen months and was then undecided.[336] These are the only cases of the period of which we have a detailed record, though we know that other cases were delayed.[337] Nor was this all, for the judges were in no way controlled by the merchants and by the mariners, nor were they even advised, as they were in later times, by experts such as the Elder Brethren of the Trinity House, and the judges were sometimes very incompetent men.[338] On the other hand, the local courts were more appropriately staffed and they were infinitely more prompt, so that we may be sure that all the Englishmen who could do so carried their litigation there. Moreover, later statutes continued to narrow the jurisdiction of the Admiralty. We have spoken of the Statute of Truces of 1414,[339] which removed many cases of piracy from its jurisdiction, but later statutes, of which we shall soon speak, entirely removed this subject and showed that the Court had failed in the main object for which it was created.[340] On the other hand, the jurisdiction over prize was partially in the hands of the Admiralty as late as 1426, in which year a proclamation of Henry VI commanded that prizes be brought in for adjudication,[341] but also permitted their trial before the Council or the Chancellor. With the breakdown of the central government in the latter part of the XV Century, the court apparently ceased to be of much importance. But long before this breakdown the other courts interfered in order to see that some sort of justice was done and there are records of a number of causes removed either to the King's Council[342] or to the Chancery.

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[331] *Select Cases before the King's Council* (Selden Society), p. xxviii. Also Wynne, *Life of Sir Leoline Jenkins,* I, p. lxxxii, "Not one cause in ten comes before that court but some of the parties or witnesses in it are pressing to go to sea with the next tide."

[332] Above, pp. 296–297, 306.

[333] Above, pp. 193, 195.

[334] *Select Pleas Ct. Adm.,* II, p. xiii.

The connection between the Council and the Admiralty had been close from early times, as we have seen, for the Navy was managed by the King and his Council with the aid of expert advice from mariners, and the earliest extant minutes of the Council, in 1337, are concerned with the Navy and with the Admiral of the North.[343] The earliest documents in the *Black Book,* of 1338–1340, refer to the King and the Council as the supreme authority in naval matters.[344] In 1343 [345] and 1352 [346] cases of piracy were tried before the Council, and in 1353 we have a case of recapture from pirates tried before both the Admiral and the Council,[347] which often tried such cases.[348] In 1361 the Council defended the jurisdiction of the Admiralty as against the common law in a case of piracy and murder at sea,[349] but in 1383 it took cognizance of such as case itself.[350] In 1382 it decided a question of wreck after a delay in the Court of the Admiralty of the North,[351] and in 1386 the Admirals were brought before the Council to defend their conduct in giving a judgment, which was then reversed.[352] During and after the time of Richard II there are many commissions to inquire as to ships spoiled and wrecked and to restore them and to bring the spoilers before the Council,[353] which frequently exercised jurisdiction in prize cases. Under the statute of 1400 double damages were given a defendant illegally sued in the Admiralty, and thus a way was opened for appealing on the ground of lack of competence. These appeals came to the Council, which was distrustful of the judicial ability of both the Admirals and their judges. As a result, suitors would often not sue in the Admiralty at all, but come before the Council at once, and, indeed, foreign suitors had to do so, until the Chancellor was given jurisdiction over them. These cases could be referred to any court, but they were usually sent before commissioners of oyer and terminer, since there were too many for the attention of the Council, though sometimes the parties were brought before the Council and the case was discussed before the commission was drawn up. Sometimes instructions were given to the commissioners and sometimes only a report of their findings was desired. The petitioners might name the commissioners whom they desired, and, indeed, the usefulness of the commission depended on its proper composition. But the system was obviously defective, for there was no coherence in the decisions of the commissions, precedents were regarded little or not at all, and the commissioners often failed to file records of their proceedings.[354]

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[335] *Gernesey c. Henton, Select Pleas Ct. Adm.,* I, pp. 17–26.

[336] *Sampson c. Curteys, ib.,* pp. 1–17.

[337] *Ib.,* II, pp. lviii–lxi.

[338] *Select Cases before the King's Council* (Selden Society), p. xxviii.

[339] Above, p. 300.

[340] *Select Cases before the King's Council* (Selden Society), p. xxix. "Under these conditions it is not strange that the jurisdiction of the admiralty throughout the fifteenth century continued to be contracted rather than expanded, while still other courts were being fashioned for receiving a share of the cases of international and commercial character. As a result, the principal part of this jurisdiction remained just where it had been from the beginning, primarily in the king's council, secondarily in the chancery."

[341] Rymer, *Fœdera,* X, p. 368.

[342] For most of the early cases see above, p. 276, n. 81.

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[343] *Black Bk. of Adm.,* I, xli.

[344] *Ib.,* I, p. xlii.

[345] *Select Pleas Ct. Adm.,* I, p. xxxviii.

[346] *Ib.,* p. xxxix.

[347] *Ib.,* p. xl.

[348] *Ib.,* p. xli.

[349] *Ib.,* p. xlv. Marsden, *Law and Customs of the Sea,* I, pp. 84–89.

[350] *Select Pleas Ct. Adm.,* I, p. xlviii.

[351] *Ib.,* II, pp. lviii–lix.

[352] *Select Cases before the King's Council* (Selden Society), p. xxix.

[353] *Select Pleas Ct. Adm.,* II, p. lxii.

The further breakdown of the Admiralty is shown by the fact that in 1429 the Commons requested the granting of such commissions to justices of the peace in order to deal with certain pirates.[355] The leniency of the Council is complained of by the Commons in 1439, for, it is alleged, at the suit of alien merchants ships captured from the enemy are released and damages paid, to the injury of natives, because of which it is established that henceforth such releases shall be made only by letters patent enrolled in the Chancery.[356] At this period, however, the power of the Council was also disintegrating, and in the civil disorders of the latter half of the century it, too, became practically powerless.[357]

Behind the Council, and originally quite subordinate to it, there remained the jurisdiction of the Chancellor. He, too, had had his finger in the Admiralty pie from an early date, and it was to the King in Chancery that appeals from cases tried in the Admiralty Courts usually lay.[358] From the earliest times, also, he had determined matters connected with piracy and with the ownership of goods taken at sea, sometimes personally, sometimes by commissions of oyer and terminer, and sometimes by sending the cases before the King's Bench.[359] And, in the same way, it also lay within his province to grant letters of marque and of reprisal. The records of piracy cases tried before him begin in 1293,[360] and there are many subsequent cases recorded up to the founding of the Court of Admiralty.[361] After then we hear almost nothing of the Chancery until practically the end of the century, perhaps because of the supervision of the Council. In 1384 a case of piracy was tried at first before the Chancellor and then before the King's Bench with a jury half of foreigners and half of Englishmen, merchants and others, since the plaintiff was a Portuguese merchant.[362] But beginning in 1392 the Chancery seems to have exercised a definite supervision over the Court of Admiralty, for in that year it removed the case of *Sampson c. Curteys* from the Admiralty of the West by a writ of certiorari, a case which, as we have mentioned, had remained undecided there for over fifteen months.[363] In 1404 *Gernesey c. Henton* was removed by the same means [364] and in 1407 *Davy c. Browne* was similarly brought into the Chancery.[365] We also have the records of a number of appeals, in which judges delegates were appointed by commissions in 1397, 1403, 1406, 1410, 1415, 1417, 1425, and 1452.[366] In 1450 a statute gave to the Chancellor and the Chief Justices [367] the authority and the jurisdiction formerly conferred upon the Conservators of Truces, and in 1453 a further statute gave the Chancellor, assisted by a judge, the right to hear cases of spoil by Englishmen on foreigners, to deal with the receivers of spoiled goods, and to make restitution of such ships and goods.[368] In 1470 there is the report of such a case, heard before the Chancellor, and, perhaps following the earlier Continental precedents,[369] the writ especially provides that because of the difficulties of proof the simple evidence of those despoiled is to be accepted.[370] In 1474 the statute of 1453 was confirmed.[371]

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[354] *Select Cases before the King's Council* (Selden Society), pp. xxix–xxx.

[355] *Rot Parl.*, IV, 351, 377,

[356] *Ib.*, V, 27.

[357] Holdsworth, *H.E.L.*, I, pp. 485, 490–491.

[358] Above, p. 300.

[359] *Select Pleas Ct. Adm.*, I, p. xvi.

[360] *Ib.*, I, pp. xvi–xvii.

[361] See above, p. 277, n. 82.

The nadir of the Court of Admiralty was probably reached at this time, for it began a slow recovery about the time of the first of the Tudors, perhaps for the same reason as that which caused its creation. "Piracy never flourished more vigorously than during the latter part of the fifteenth century. English, French, Spanish, Portuguese, Genoese, Venetian, Flemish and German corsairs preyed upon the shipping of all countries indiscriminately; and the diplomatic correspondence of the period is full of complaints as to the difficulty of getting redress." [372] In 1490 Henry VII made a proclamation against harboring pirates or purchasing goods from them.[373] Under

[362] *Select Pleas Ct. Adm.*, I, p. xliii–xlix.

[363] *Ib.*, pp. 1–17.

[364] *Ib.*, pp. 17–26.

[365] *Ib.*, II, pp. lx–lxi.

[366] *Ib.*, pp. lix–lxii.

[367] 29 Hen. VI, c. 2.

[368] 31 Hen. VI, c. 4.

[369] Above, p. 145.

[370] Rymer, *Fœdera*, December 20, 1470.

[371] 14 Edw. IV, c. 4.

[372] *Select Pleas Ct. Adm.*, I, p. lvi.

[373] Marsden, *Law and Customs of the Sea*, I, pp. 145–146.

such circumstances a court having strong authority and a specialized jurisdiction was required. Henry VII seems to have understood this, for he considerably extended the powers of the Admirals, while his son, Henry VIII, placed their jurisdiction upon a strong and definite statutory basis.[874] Henry VII also engaged actively in the development and clarification of public international law at sea, of which we shall speak in several sections below, and in the abolition by treaty of the disintegrating right of reprisals. It was he who issued to John Cabot, in 1496, the first English letters of discovery of which we have any record, authorizing him to sail in the endeavor to discover islands and countries then unknown, the discovery of Newfoundland in 1498 being the result.[875] The first patent of a judge of the Admiralty that we possess was issued in 1482 to William Lacy, bachelor in laws, three years before the accession of Henry VII, and it is in general terms, empowering him to decide all cases pertaining to the Admiralty: "ad cognoscendum procendendum et statuendum de et super querulis causis et negotiis omnium et singulorum de hiis quæ ad curiam principalem Admirallitatis nostræ pertinent." [876] In 1484 Robert Rydon was appointed, with Lacy, a Commissary General in the Admiralty, with power to try civil and criminal cases, and they were to engage a notary to keep records of all their acts.[877] Even as yet the Court of Admiralty cannot have been properly efficient, since these commissaries were intended to act partly as judges; later, in 1495, Rydon is called a judge of the Admiralty.[878] The Court of Requests, originally a committee of the Council, possessed a procedure "altogether according to the process of summary causes in the civil law," and in the time of Henry VII it had a well established Admiralty jurisdiction delegated to it from the Council. Its chief attention seems to have been taken up with cases of piracy, spoil, and reprisals. In 1495 a mandate to the bailiffs of Weymouth commands the restitution of a ship; in the same year a Dane detained on suspicion of piracy is released after taking an oath not to molest Englishmen because of his imprisonment; an Englishman is granted letters of reprisals against Denmark because of his merchandise seized by Danes, and later a ship is adjudged his prize, subject to his giving the Court bail to account for its value, following an appraisal. In 1496 a Spaniard complains of plundering against certain inhabitants of the Cinque Ports, who prove that they were really salving his merchandise from his ship on the Goodwin Sands.[379] In 1498 it was agreed by treaty with France that mariners were to bring spoil back into port and not to dispose of it until it had been declared lawful prize by the Admiral.[380] The Paston Letters of 1491 show much disorder at sea: Danish ships making reprisals on the English coast; the King of Denmark complaining to the King of England of robbery by English fishermen in Iceland; attacks on ships of Holland and Sealand by an Englishman whom the Admiral is holding to bail.[381]

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[874] *Select Cases before the King's Council* (Selden Society), p. xxx. Senior, p. 54.

[875] Nys, p. 368.

[876] *Pat.* 22 Edw. IV, pt. 1, m. 2.

[877] *Cal. Pat. Rolls,* April 8, 1484.

[878] XXII *Eng. Hist. Rev.,* p. 471.

Finally, we must speak briefly of certain points of the law having an international bearing.

THE RIGHT OF SHIPWRECK

We have already spoken at some length[382] of this, one of the most barbarous customs of the Middle Ages, a custom so barbarous that even in the VI Century,[383] the barbarian king of the Visigoths had legislated against it. Nevertheless, it flourished in the Middle Ages, as all the unsuccessful efforts of Popes, Emperors, and rulers to suppress it, which we have cited above, show quite plainly. Attempts were made in England also. Flotsam, jetsam, and lagan, and sea waifs and strays generally, while floating in the wide ocean, originally appear to have belonged to the finder, if the owner could not be found, although this does not seem to have been the later rule of the Admiralty. Such goods, however, if taken up in the narrow seas, or if cast ashore, belonged to the Crown.[384] In England there was apparently one customary exception, as shown by a case of 1102, where a ship of the King was involved, and where the King himself admitted the custom, and that was that if a ship came ashore and the mariners failed to repair her within a given time, both the ship and her cargo were considered to be wreck and they were seized by the feudal lord of the soil. Wreck was sometimes granted away by the King, occasionally as a manorial right, and a percentage of wreck was usually granted to the Admiral.[385] The earliest grant of wreck appears in a charter of Edward the Confessor to Ramsey Abbey, but the same King also endeavored to modify the right of shipwreck.[386] The King also claimed all whales and other "royal fish." Those who seized wreck without a grant from the Crown were liable to prosecution. In 1167 there was a case of a man being fined for seizing wreck without a warrant from the justiciar, and all through the reign of Henry II (1154–1189) it was a duty of the sheriff to account to the King for the proceeds of all the wrecks that occurred within his district. The Norman custumals were rather similar but effected a division between the feudal lord and the overlord. Wreck which was unclaimed by the owner after a year and a day belonged to the feudal lord, with the exception of certain valuables, such as gold, silver, hawks, and warhorses, which were the share of the Duke. Henry I in 1129 and Henry II in 1174 are said to have been the first of the Anglo-Norman kings to condemn the right to wreck, but this is not certain. In 1190 Richard I granted to the city of Bayonne the privilege that the right of wreck should not apply to those who survived the shipwreck, nor, if they perished, to their children, their brothers, or their sisters. In 1227 wrecked goods were restored to their owners and in 1236 Henry III laid down a rule that survived in part for over five hundred years. If any man or beast escaped alive out of a wreck the owner of the wrecked goods could have his property back if he claimed it within three months.[387] In practice, unfortunately, this rule sometimes led to the murder of shipwrecked people. In 1269 a treaty with Norway provided that shipwrecked persons should not be deprived of their goods.[388] In 1275 the law was given definitive form under Edward I by the Statute of Westminster, which reenacted the ordinance of Henry III but extended the time for claiming the shipwrecked goods to a year and a day.[389] In 1277 the so-called

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[379] Senior, pp. 55–57.

[380] Rymer, *Fœdera*, XII, p. 690.

[381] Cited, Senior, p. 58.

[382] Above, pp. 114–117.

[383] Huvelin, p. 468, n. 5, citing *Lex Romana Visigothorum*, VI, 4, 4, "Quicquid ex incendio, ruina vel naufragio raptum fuerit, et aliquis ex hoc quidquam ab aliquo susceperit vel celaverit in quadruplum reformare cogatur."

[384] *Stat. Prærogativa Regis*, 17 Edw. II, st. I, c. xi.

[385] *Select Pleas Ct. Adm.*, II, p. xxiv. *Black Bk. of Adm.*, I, 150–151.

[386] Wilkins, *Leges Angl. Sax.*, p. 104.

[387] *Chart. Roll*, 20 Hen. II, m. 4. Rymer, *Fœdera*, I, p. 227 is from a later copy.

[388] Rymer, *Fœdera*, I, p. 450.

[389] 3 Edw. I, c. 4. See also 4 Edw. I, st. 2, c. 4. This principle was recognized in a treaty between Henry VII and Philip of Burgundy in 1495. Desjardins, p. 95.

statute *De Officio Coronatoris* provided that wrecked goods should be held in the custody of the towns, and any individual seizing it should be fined.[390] In 1353 it was enacted that goods coming to land, not being wreck, were to be delivered to the owners on proof of ownership, without suit, the finders being reimbursed for their efforts.[391] This was the law for over four centuries, until, in 1771, Lord Mansfield decided in *Hamilton v. Davis,* 5 Burr. 2732, that, even though no living thing escaped from the wreck, the property in the goods continued to remain in the owner.[392]

REPRISALS

Both in the previous chapter [393] and in various places in this chapter we have mentioned the disintegrating mediæval right of reprisals. We do not intend to deal with it more specifically here, but only to record English efforts to end it, mostly, as on the Continent, by way of treaties. The granting of letters of marque and of reprisals originally lay within the jurisdiction of the Chancellor, and it was usual to require proof of loss, or at least an oath, before they were granted.[394] In 1295 letters of reprisal were granted by the King's lieutenant in Gascony and later confirmed by the King.[395] We have studied the troubles that reprisals caused Edward III and the difficulties in which they involved him, so that in 1351 and 1353 he decided not to grant such letters,[396] except as against the specific individual involved. Moreover, in 1353 there was enacted a statute [397] by which foreign merchants despoiled of their goods at sea were to have them restored without suit at common law and by employing mercantile proofs: "soit receu de prover les ditz biens estre les soens par ses marches ou par sa carte ou coket ou par bons et loialx marchantz privez ou estrangers et par tieles proeves soient meismes les biens deliveres au marchant saunz autre seute faire a la cöe lei." In 1410 it was endeavored to modify the law of reprisals by treaty with the Teutonic Order, but not very successfully.[398] In 1412 we have actual copies of letters of marque and of reprisal issued against the Duke of Brittany in favor of a merchant of Dantzig in Prussia, "quarum partium populus de amicitia nostra diutius extitit." [399] In 1412 we also have, conformably to Legnano's theory of reprisals, three successive letters of requisition to the magistrates of Malines, requesting them to enforce a judgment for 168 nobles, in default of which reprisals are threatened.[400] The Statute of Truces of 1414, it is said, made the King's subjects afraid to attack his enemies.[401] To us this sounds somewhat fanciful, but in any case there was enacted, in 1416, a statute by which Henry V agreed to grant letters of reprisal as far as treaties had not abolished their use,[402] and at the beginning of the XV Century there were issued many letters of marque [403] and reprisal. A complainant was to address himself to the Lord Keeper of the Privy Seal, who would send letters of requisition, like those just mentioned, to obtain satisfaction. Failing satisfaction within a reasonable time the Chancellor would deliver letters of marque under the great seal, after which the complainant could attack and seize property without fear of being condemned as a pirate. In 1440 and again in 1468 treaties between England and France contained a clause aiming at the suppression of reprisals and providing that all captains of ships leaving their ports should be compelled to swear not to exercise the right of reprisals against the other. A similar provision is to be found in a treaty between England and Spain in 1489.[404] In 1490 Henry VII granted a general safe conduct to the Duke of Milan providing that the Milanese might trade with England without being subjected to reprisals.[405] In 1514 England and France agreed that reprisals should be granted only against the specific debtor concerned and not even then until after his refusal to pay had been judicially established.[406] The treaty of 1496 between Henry VII and Philippe le Beau is surprisingly enlightened. It provides for the nullity of all letters of marque and reprisal previously issued, and that none shall be issued in the future for any reason whatever; no goods shall be seized; no persons shall be arrested; there shall be no war, in the cases of such disputes, but each prince shall pay the damages himself if justice is not done,[407] a powerful incentive, no doubt, to keeping the judiciary efficient. Nevertheless, a number of letters of reprisal were issued during this period against other states.[408]

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[390] In Chapter viii of the treatise on the *Lex Mercatoria,* as given in Bickley, I, pp. 67–68, there is an excellent statement of the mediæval English law of wreck, compiled in the XIV Century. It was essentially based on these rules of 1275 and 1277.

[391] 27 Edw. III, st. 2, c. 13.

[392] General authorities for this section: *Select Pleas Ct. Adm.,* II, pp. xxxix–xli: Desjardins, pp. 40–41, 51.

[393] Above, pp. 224–234.

[394] *Select Pleas Ct. Adm.,* I, p. xvi.

[395] Marsden, *Laws and Customs of the Sea,* I, pp. 38–41.

[396] 25 Edw. III, st. 5, c. 23. 27 Edw. III, st. 2, cc. 17, 19.

[397] 27 Edw. III, st. 2, c. 13.

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[398] Rymer, *Fœdera,* VIII, p. 663.

[399] *Black Bk. of Adm.,* I, pp. 385–390.

[400] *Ib.,* I, pp. 390–394.

[401] Senior, p. 44.

[402] 4 Hen. V, st. 2, c. 7.

[403] Marsden, *Law and Customs of the Sea,* I, pp. 111–126, gives the text of a number, dating from 1400 to 1414.

[404] Nys, p. 72.

[405] *Ib.,* p. 75.

[406] *Ib.,* p. 75.

BLOCKADE AND THE RIGHT OF A NEUTRAL TO TRADE BY SEA WITH A BELLIGERENT

"A blockade, in order to be binding, must be effective." [409] On this point all modern international law agrees,[410] but it was a point unheard of, and probably unthought of, in the Middle Ages, for the very idea of a blockade seems hardly to have been comprehended. No less unknown was the modern conception of the right of neutrals to use the high seas in time of war for an uninterrupted commerce, as far as possible, and the neutral seems to have been without any acknowledged right to trade with a belligerent. In the XIII Century it became the custom, at the outbreak of war, to make a proclamation forbidding all ships to carry food or munitions to the enemy, on pain of confiscation. Such a proclamation was made by Henry III in 1223,[411] but most states contented themselves with forbidding their subjects to transport by sea certain articles.[412] A number of German ships were confiscated for violating this prohibition in 1293.[413] A belligerent might even go further and prohibit a certain neutral from trading with a belligerent, just as in 1294, when England, then at war with Spain, prohibited the Portuguese from carrying Spanish cargoes.[414] But this principle was pushed to its logical extreme, and it was desired to prohibit all maritime commerce of neutrals with a belligerent. Such a theory, as Nys correctly observes,[415] contains the germ of the theory of blockade, or, as Desjardins states even more precisely,[416] of fictitious blockade.

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[407] Nys, p. 75.

[408] Senior, pp. 56–58.

[409] Declaration of Paris, 1856, rule 4. Declaration of London, 1909, Ch. I, Art. 2.

[410] Hall, 7th ed., pp. 760–761. Westlake, Part II (War), p. 263.

[411] Nys, p. 226.

[412] *Ib.*, pp. 224–225.

[413] Marsden, *Law and Customs of the Sea,* I, pp. 21–31.

[414] Westlake, Part II (War), p. 140.

[415] Nys, p. 228.

[416] Desjardins, p. 74.

This result was accomplished in three ways, by treaty, by diplomatic requests to neutrals, and by brute force. In 1303 we can see the system at work. In that year England made a treaty with France by which neither party was to comfort the enemies of the other or to permit them to have assistance from his country.[417] Such a treaty was made with Scotland, also. In the following year English ships carrying goods to Brabant were seized by the French, who were at war with the Flemings. After the conclusion of peace the English owners put in a claim for spoil to arbitrators, to whom the French replied that in seizing the ships they were acting under the orders of their Admiral and in exercise of the French king's right [418] (we must presume, although it is not stated) under the treaty. In 1315 [419] and again in 1337 [420] English ordinances forbade neutral merchants to trade with the Scotch, with whom England was at war, under penalty of the loss of all their privileges. In 1336 the Count of Holland was requested not to supply ships to the Scotch, and similar requests were sent to the Count of Gueldres and to the King of Norway.[421] In 1338 Edward III requested the King of Castile to prohibit his subjects to trade with the Flemings, with whom England was at war, but he was met with a refusal.[422] In 1346 Edward went further than ever before and decreed that any neutral vessel attempting to enter a French port would be seized and burned.[423] This was, of course, a paper blockade, and was severe even for its own times, so that it deserves the criticism it has received; but it may be said in extenuation, if it really is any extenuation at all, that other countries subsequently followed this bad example. That Edward III himself probably did not believe this to be a binding principle of public law is shown by the fact that in 1370 he made a treaty with the Flemings, by which either party, being neutral, renounced all right to trade with any enemy of the other for the duration of the war.[424] There was a line of such treaties,[425] which were continued in the XV Century: in 1467 England and Burgundy mutually agreed that no goods of the other's enemy were to be admitted by sea; [426] in 1478 they agreed not to carry enemy goods in their vessels.[427] These principles of non-intercourse and of paper blockade were carried out even more fully in the XVI and XVII Centuries.[428]

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[417] Rymer, *Fœdera,* II, p. 927.

[418] *Select Pleas Ct. Adm.,* I, pp. xxx–xxxii.

[419] Rymer, *Fœdera,* II, p. 76.

[420] *Ib.,* IV, p. 54.

[421] Marsden, *Law and Customs of the Sea,* I, pp. 64–66.

[422] Westlake, Part II (War), p. 140.

[423] Nys, p. 228; Desjardins, p. 74.

[424] Nys, p. 226.

[425] Westlake, Part II (War), p. 140.

[426] Rymer, *Fœdera,* XI, p. 596.

VISIT AND SEARCH—CAPTURE OF PRIVATE PROPERTY AT SEA

"The neutral flag covers enemy's goods, with the exception of contraband of war. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag." [429] "Forcible resistance to the legitimate exercise of the right of stoppage, search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment as the cargo of an enemy vessel." [430] Such are the last established and generally agreed statements of the modern law on these points. In the Middle Ages the general rule was that the neutral flag did not cover enemy goods,[431] but that, as today, neutral goods were not liable to capture under the enemy's flag.[432] In general, however, it seems that the latter rule did not apply in England, but that neutral goods under an enemy flag were good prize.[433] In 1296 the capture of enemy goods in a friend's ship was declared good.[434] In the Instructions for the Lord Admiral in Time of War, dating from about 1338–1340, Article VII [435] laid down a rule of visit and search and stated that a suspicious neutral vessel was to be brought into port to be examined by the Admiral. Further, it stated as a principle that enemy goods were liable to capture in a neutral vessel, which is in accord with the general mediæval rule as laid down in the first part of Chapter CCXXXI of the Consulate.[436] There is also evidence that at this early period England had not adopted her later rule,[437] but that she followed the general custom as laid down in the second part

[427] Rymer, *Fœdera,* XII, p. 73.

[428] Nys, pp. 228–229.

[429] Declaration of Paris, 1856.

[430] Declaration of London, 1909, Ch. VIII, Art. 63.

[431] *Black Bk. of Adm.,* I, p. 29, n. 5.

[432] Above, pp. 122–123.

[433] Westlake, Part II (War), p. 141.

[434] Marsden, *Law and Customs of the Sea,* I, pp. 42–44.

[435] *Black Bk. of Adm.,* I, pp. 28–29.

[436] *Ib.,* III, pp. 539 *et seqq.*

[437] Westlake, Part II (War), p. 141, disagrees, but his understanding of the judgment of 1357, for instance, is not accurate. It was decided on the ground of recapture, not of neutral rights. The silence of the Instructions in Time of War is certainly not conclusive, as they are extremely incomplete and rudimentary. Senior, p. 52, is by no means as positive as Westlake.

of Chapter CCXXXI of the Consulate, that neutral goods on an enemy's ship were not liable to capture. This rule is accepted and laid down in treaties made by England with the maritime towns of Biscay and Castile in 1351,[438] and with the King of Portugal in 1353.[439] The Consulate also provided in the same chapter that, if enemy goods were seized on a neutral ship, the neutral captain should be paid the sum owing for freight by the belligerent captor. In 1346, 1375, and 1378 we have the King of England making such orders and very evidently accepting the rule,[440] and in 1374 a safe-conduct was granted to a Catalan galley on condition that she carried no enemy goods.[441] Treaties with Genoa in 1372, with Flanders in 1417, and with Portugal in 1436 recognized the principle that the neutral ought not to carry enemy goods.[442] There was a single case of 1337 in which a neutral ship was condemned for having enemy goods and persons aboard.[443] A convention of 1406 between England and Burgundy did away with this privilege of paying freight to a neutral, as regarded the contracting parties,[444] and also recognized the principle of the right to capture. In 1413 the provisions of the Consulate were certainly recognized by English commanders, as well as the right to capture neutral vessels following resistance to an attempted visit and search, the vessels involved being Prussians on their way to France.[445] This case was committed to the Court of Admiralty, at the petition of Parliament.[446] In 1442 there was a similar exercise of the right of visit and search of neutral vessels.[447]

In the same year the earlier rule was changed by a statute which expressly asserted that neutral goods in an enemy ship were liable to capture.[448] In 1460 a treaty between England and Genoa laid down the same principle, but stipulated for the payment of freight to the neutral captain, which was in accord with the Consulate. It also provided for the right of visit and search.[449] Four treaties with Burgundy and Brittany laid down the same principles. In 1467 England and Burgundy agreed that the goods of an enemy of the other were not to be admitted by sea;[450] in 1468 England and Brittany agreed that neutral persons and goods on board enemy ships were to be good prize, and that their own ships would mutually agree to submit to visit and search for enforcing these provisions;[451] in 1478 England and Burgundy mutually agreed not to carry enemy goods and to submit to visit and search in order to enforce the treaty;[452] in 1486 England and Brittany agreed again that neutral persons and goods were good prize on enemy vessels.[453] In 1495 England and Burgundy agreed that enemy goods were good prize aboard neutral vessels.[454] The English rules, therefore, as established in the XV Century, seem quite plain: enemy goods are liable to capture under a neutral flag; neutral goods are liable to capture under an enemy flag. In the latter respect the English rule was more narrow than the general mediæval rule; in both respects the English rule was narrower than the modern rule.

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[438] Rymer, *Fœdera,* V, p. 719.

[439] *Ib.,* 764. Marsden, *Law and Customs of the Sea,* I, pp. 78–80. The case on p. 282 above of 1357, was a claim under this treaty.

[440] Marsden, *Law and Customs of the Sea,* pp. 75–77; 102–104; 106–107.

[441] *Ib.,* I, pp. 97–99.

[442] *Ib.,* p. 98, n. 1.

[443] *Ib.,* pp. 66–67.

[444] Desjardins, p. 95.

[445] The case is given at some length in Senior, pp. 49–52.

[446] *Rot. Parl.,* IV, 12.

[447] Senior, p. 50.

[448] 20 Hen. VI, c. 1.

[449] Desjardins, p. 95.

[450] Rymer, *Fœdera,* XI, p. 596.
[451] *Ib.,* p. 622.
[452] *Ib.,* XII, p. 73.
[453] Desjardins, p. 95.
[454] *Ib.,* p. 95.

CHAPTER V

EARLY ENGLISH COMMERCIAL LAW

In this chapter we shall carry the parallel development of the English commercial law up to the end of the XV Century. In the early pages of Chapter IV we have set forth the reasons which made the choice of such a terminus appropriate as well for the maritime law as for the commercial law.[1] For this chapter, however, the terminus must be changed by a very few years. We have shown how the Court of Admiralty reached its nadir in the early XV Century, and if, during the reign of Henry VII, it went no lower, neither did it materially expand. At the most it was a period of dormancy, when the Court lay fallow and ready for its growth under Henry VIII. With commerce, however, the case was different, and its development began again after the temporary check of the Wars of the Roses. The young country was just rising into nationhood, and Henry VII was preparing the way for Henry VIII and for Elizabeth. The long struggle between foreigner and native was carried on during the whole Tudor period to a complete victory for the latter at the end. In this respect, indeed, the Tudor period stands by itself as an independent entity, and so it seems best to end our period in 1485 with the accession of Henry VII, although such limits, of course, cannot be strictly kept.

The struggle of English commerce to free itself from the control of foreigners was most opportunely timed, and its substantial success came just at the right moment, in the opening years of the XVI Century, when world commerce was beginning to expand as never before,[2] and this position, securely consolidated by the English merchants throughout the XVI Century, led to their complete triumph over the foreign traders and their even stronger position in the XVII Century, when their commerce expanded so tremendously both in Europe and in America. The distance was indeed great from the small and restricted local English commerce of the XIII Century.

Just as in the field of maritime law, so, too, in the field of commercial law our earliest information is regrettably scant, but what there is of it goes to prove the surprising continuity of the law, at least in principle. The differences are not so much in kind as in degree, although, we must hasten to add, it is a very considerable degree. The reason for this lies in the early backwardness of English commerce, which did not begin to develop until a period of a century and a half and even two centuries later than that of the Continent. It was probably for this reason that there was so considerable a reception of the more advanced principles of Continental commercial law at the time of the great expansion of English commerce in the XVI Century, although in a less developed form their germinal principles may sometimes be recognized as having existed quite independently in England at a somewhat earlier period, and in a state adapted for the smaller transactions of internal trade.[3]

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[1] Above, pp. 262–263.

[2] Above, p. 262, n. 1.

Nevertheless, we may help out the scantiness of our early knowledge with the aid of our study of the same phase as it existed in Northern Europe, and, just as we have seen that the conditions in the Mediterranean under which the sea law existed did not change for five hundred years,[4] so we can fairly infer from the evidence that we have that the conditions prevalent in England during the Dark Ages continued and were in general existence at the beginning of the Middle Ages. Such commerce as there was appears to have been small and hazardous and to have returned to the more primitive condition of periodicity,[5] for England was a backwater and much out of the current of European economic life at this time. There are traces of connection with the Mediterranean, but the earliest influences seem to have been Teutonic, as we would expect, and, more particularly, Frankish. The early currency of England was copied from that of the Merovingian kings and was probably inspired by the interchanges of commerce.[6] English merchants visited the early Frankish fairs, and an English merchant was living at Marseilles early in the VIII Century.[7]

The development of the early English courts in which the law merchant was administered seems also to have followed the general model of those in Northern France and Germany, which we have previously considered.[8] It was in no way like those in Provence, in Italy, and in Spain. In this latter group, as we have seen,[9] the law was developed within rich, powerful, self-governing, and independent cities. There were no such great city-republics in England, and no cities capable of assuming such a rôle until several centuries after the Conquest. Instead, the towns were small and weak, with few of any great importance; they were dependent and their rights were based on charters secured from a strong monarch, just as, on the Continent, they were secured from a strong overlord. And just as, on the Continent, we saw towns growing up about the markets and fairs,[10] so, to a lesser extent, the same process went on in England.[11]

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[3] Holdsworth, *H.E.L.*, V, pp. 102, 113.

[4] Above, p. 51.

[5] Above, p. 133. Cf. below, p. 358.

[6] *Mediæval England* (Oxford, 1924), Ch. XIII, p. 532.

[7] *Ib.*, Ch. XIV, p. 577.

The parallels go even further, and we see a royal protection for the market, a restriction of commerce to the market, an extension of the royal protection to all those coming to and going from the market, and, finally, with one or two notable exceptions we see that the markets particularly, and generally the fairs, were of considerable local importance and sometimes of regional importance, but not usually of international importance. This was especially the case in England,[12] where the trade with the Continent was small until the XIV Century, and where few foreigners seem to have attended the fairs. But English commerce was developing, none the less. In the XII Century it was local; in the XIII Century it had become more national; in the XIV Century it was just becoming international; [13] and in the XV Century it was able to attack the privileges of the foreigners with success.

But the legal procedure of these smaller market and fair and borough courts was quite like that on the Continent,[14] and they kept alive and familiar to Englishmen the fundamental principles of the procedure of the law merchant. These humble courts proceeded swiftly and in a summary fashion; [15] they took the common-sense view of the matter rather than the legal and formal view; and, greatest of all, the merchants themselves always had a share in the administration of the court. In the next place, this participation of the merchants extended beyond the question of court procedure to the actual content of the law itself, which, before the end of the XIII Century, was recognized as being a special body of law peculiar to the merchants.[16] As to the exact content of the law we cannot say much very definitely, for the records of these courts were poorly kept and but few of the records have been preserved. But we may be sure that the law was more primitive than it was on the Continent. Until the middle of the XIII Century neither the Italians nor the Easterlings came to England in any large numbers, and when they did come they kept very much to themselves because of their special privileges, so that it seems plain that the Italian improvements of the law merchant could not have been widely diffused. The foreigners confined themselves at first to a few centers, and since most of the country's exports were concentrated in their hands it is plain that English business continued to be small and local and would naturally have taken over nothing of the law. And, just as elsewhere, so in England, the Italians, for instance, kept by themselves and lived under their own laws [17] and their own judges or else employed special types of procedure and had special privileges, as we shall see. In fact, for almost two centuries after the middle of the XIII Century the history of English commerce is chiefly concerned with that of the foreigners, and if the English commercial law seems at first to be little adapted to an international commerce it is because that commerce was as yet in its infancy.

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[8] Above, pp. 128–137.

[9] Above, pp. 137 *et seqq.*

[10] Above, pp. 172 *et seqq.*

[11] Maitland, *Select Pleas in Manorial Courts,* p. 130.

[12] Holdsworth, *H.E.L.,* V, pp. 113–114. "The impression which the published records of our fair courts leaves upon me is that they were courts which dealt for the most part with petty transactions."

[13] Nys, p. 194. "Le commerce anglais, notons-le, traverse trois phases successives: municipal au XII^e siècle, il devient national avec Édouard Ier, et international avec Édouard III. Dans la première période, le marchand de Norwich est aussi étranger à Londres que le marchand de Bruges."

[14] Above, pp. 134–137, 173 *et seqq.*

[15] *Select Essays in Angl. Amer. Law* III, p. 35.

It is of its earliest days that we must now speak, and our earliest dated record tells us of commerce with the kingdom of the Franks and of the royal protection that was extended to merchants in England as well as on the Continent.[18] In 796 Charlemagne wrote to Offa, King of Mercia, requesting protection for his own merchants, and promising it reciprocally to Mercian merchants within his own realm, "according to the ancient custom of commerce." [19] Any oppression was to be rectified by the royal judges or by the king, and this shows to us at once that we are in the very early period when the king had to protect the merchant, whether foreign or native, and when the latter was often described as "the king's man" or "the Emperor's man." [20] As regards the foreign merchant we shall see that this condition, in which royal protection was required, existed for many more centuries. King Alfred, in the latter part of the IX Century, reëstablished the English fairs [21] and enunciated a principle whose echoes were heard for another six centuries: it was provided that alien merchants should come only to the four fairs and that they should not remain longer than forty days.[22] If at any other time a merchant wished to visit the country it was necessary to obtain a special license from the king,[23] and this tells us of a time when the words alien and enemy were substantially synonymous in the general estimation.[24] From a law of King Athelstan, in 925, we infer that travel to the Mediterranean was both infrequent and dangerous, since the thegn right was granted to any merchant who had made three voyages there.[25] A little later, in the time of King Ethelred II, the Redeless, (978–1016) we have the earliest record of foreign merchants settled in London, "men of the Emperor" from Cologne and from inner Saxony [26] who anticipate by two centuries the future commercial relationships of the Hanseatic League. It was Ethelred, too, who proclaimed that the ships of merchants or of enemies, coming with goods from the high seas into any port, should be at peace.[27] At a little before and a little after this reign we also have mention of the early peace and protective gilds which were probably the ancestors of the mediæval commercial gilds,[28] although they had no share in town government at this time and were not true merchant gilds.[29] In the last chapter

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[16] Gross, *Select Cases, Law Merchant*, pp. 5–118, *passim*.

[17] Schanz, pp. 380–381.

[18] Huvelin, pp. 152–153; 167–168.

[19] *Ib.*, p. 152, n. 3, citing Jaffé, *Bibliotheca rerum germanicarum*, VI, 286. "De negotiatoribus quoque scripsisti nobis. Quos voluimus ex mandato nostro ut protectionem et patrocinium habeant in regno nostro legitime iuxta antiquam consuetudinem negotiandi. Et si in aliquo loco iniusta affligantur oppressione, reclament se ad nos vel nostros iudices, et postea piam iubebimus iustitiam fieri. Similiter et nostris; si aliquid sub vestra potestate iniusta patiantur,

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reclament se ad vestræ æquitatis iudicium; ne aliqua inter nostros alicubi oboriri possit perturbatio."

[20] Above, pp. 131, 137.

[21] Huvelin, pp. 281–282.

[22] Walford, p. 19. *Mediæval England,* Ch. XIV, p. 582.

[23] Schanz, I, pp. 379–380.

[24] *Ib.,* p. 379. "Es ist eine ganz allgemeine Erscheinung der frühesten Mittelalters, dass der Fremde als ein Feind und Rechtsloser, mindestens als ein höchst Verdächtiger betrachtet wurde."

[25] Goldschmidt, p. 103, n. 22, citing Schmid, *Gesetze der Angelsachsen,* pp. 389, 481. Stubbs, p. 89.

[26] Goldschmidt, p. 113, n. 59. Schanz, I, pp. 173, 380.

[27] Walford, pp. 19–20.

[28] Goldschmidt, p. 114 and n. 65.

[29] Gross, *Gild Merchant,* p. 2.

we mentioned the legislation of Edward the Confessor regarding wreck.[30] That monarch also brought the English law into accord with the Continental law by enacting that a warranty was not necessary for a purchase of cattle in a market, since the market itself acted as a warranty,[31] a germ of law in which we may perceive the later principle of purchase in market-overt. William the Conqueror legislated, as we have seen,[32] regarding jettison. He it was who established so secure a peace that, as the old chronicler says, *merchants* could travel through the country with a purse full of gold and no harm would befall them.[33] He also enacted that all markets and fairs should be held in fortified and defensible places, where customs could be collected and justice and judgment be properly administered;[34] and in his day, too, it was necessary for an alien to have a license in order to be permitted to enter the kingdom.[35] All this speaks to us of a certain amount of commerce, and such seems to have been the case. We have just spoken of the presence of Germans in the time of King Offa, and it is only a few years later when we read of commercial relations with the North of France.[36] At the time of the Conquest there was a considerable demand for English embroidery which was exported as far as Italy, and at that time and even later slaves were regularly exported to Ireland.[37]

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[30] Above, p. 264.

[31] Huvelin, p. 459 and n. 2.

[32] Above, p. 264.

[33] Guillelmus Pictavensis, *Gesta Willelmi,* J. A. Gilles, ed., p. 149. "Portus et quælibet itinera negotiatoribus patere, et nullam iniuriam fieri iussit." Cited in Huvelin, p. 374, n. 4.

[34] *Ib.*, p. 197, n. 2, citing Lois de Guillaume le Conquérant, III, 11: "Item nullum mercatum vel forum sit nec fieri permittatur, nisi in civitatibus regni nostri, et in burgis [clausis] et muro vallatis, et in castellis, et in locis tutissimis, ubi consuetudines regni nostri, et ius nostrum commune, et dignitates corone nostre, que constitue sunt a bonis predecessoribus nostris deperire non possint, nec defraudari, nec violari, sed omnia rite, et in aperto, et per iudicium et iusticiam fieri debent. Et ideo castella, et burgi, et civitates site sunt, et fundate, et edificate, scilicet, ad tuicionem gencium et populorum regni, et ad defensionem regni, et idcirco observari debent cum omni libertate, et integritate, et racione."

[35] Stubbs, p. 104. Customs of Chester, temp. William I. "Si sine licentia regis ad portum civitatis naves venirent vel a portu recederent, de unoquoque homine qui navibus esset, xl. solidos habebat rex et comes. Si contra pacem regis et super ejus prohibitionem navis adveniret, tam ipsam quam homines cum omnibus qui ibi erant habebat rex et comes."

[36] Schanz, I, p. 291. "In Folge der geographischen Lage musste der Verkehr mit dem nördlichen Frankreich der älteste sein. Schon die um das jahr 1000 gemachte Aufzeichnung de institutis Londoniæ führt unter den Kaufleuten die in England verkehrten, die Leute von Ponthieu, von der Normandie und dem Herzogthum Francien auf."

After the Conquest there seems to have been a short flowering of the English commerce as regards Scandinavia, whither the English went in some numbers and where their influence was originally preponderant. Their early privileges in Norway were granted by King Olaf Kyrre (1066–1093), and by the time of Henry III commerce was mutually free to each other and many Norwegians and Danes also came to England.[38] The English were then by far the most numerous of the foreigners in those countries; they organized the Norwegian commerce, and their goods enjoyed the same supremacy that they themselves did.[39] By treaty, also, the mediæval system of licensing merchants was done away with.[40] But presently the English began to lose their leadership as the German city states rose to power and sent their representatives to Norway in numbers, especially beginning with the XIV Century. The Hanseatics even attacked the English, burned their houses, and seized their goods.[41] But it is not our purpose to go into the English commerce abroad at any length, and we must now turn to consider the development of the English markets and fairs, which had acquired some importance by the middle of the XII Century.[42]

M. Huvelin, the great Continental authority on fairs and markets, quotes Herbert Spencer with approval in a passage that strongly overestimates the later importance of the English fairs;[43] and Mr. Mitchell lays far too much insistence on their international character.[44] The reality is a rather humble one. By comparison with similar fairs on the Continent, those of England were very small, and an examination of the records of their courts is surprisingly meager in what it produces. The signs of the presence of foreigners are by no means what we might expect, and the importance of the fairs seems to have been national rather than international. But as regards the institution of the fair itself, and of its courts, the resemblance at once becomes closer, and we are examining a piece of machinery similar to, if not quite so large as, those which existed all over the Continent. To understand *it* we must constantly refer to *them,* and in this respect we have at once established a true internationality. As we have seen, it is to King Alfred that credit is attributed for the foundation of the earliest English fairs, which were held four times a year and to which the merchants came from abroad.[45] The resemblances to the Teutonic fairs which we have already examined [46] are extremely striking. Here as there it was necessary to confine commerce to certain definite places in order to protect it readily, and so trade was practically restricted to fairs held in the "burhs," which were protected by the king's special peace and guarded by the market cross.[47] Those going to or coming from it were also under the royal protection, and, if trade was not actually confined to the "burh," nevertheless it was a dangerous matter to buy goods elsewhere, in case they had been stolen.[48] For this reason goods sold at a market did not need a warranty.[49] But there was probably a fiscal reason as well, just as there was on the Continent. The king had granted special rights and a special protection, and for this he expected to be paid in the form of tolls.[50] Like other rights this right to take tolls was granted to their subjects both by the Anglo-Saxon and the Norman kings; [51] it became a franchise, about which a considerable body of law grew up. The process was continued by the Normans, and William the Conqueror, as we have seen, enacted that fairs and markets should be held in safe places; [52] he granted a fair to the bishop of Winchester, and the fair at Chester probably existed in his time.[53]

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[37] *Mediæval England,* Ch. XIV, p. 577.

[38] See their privileges as set forth in the *Liber Custumarum, Munimenta Gildhallæ* (Rolls Series), II, Pt. I, pp. 63–64.

[39] Schanz, I, pp. 247–248.

[40] Rymer, *Fœdera,* I, p. 74.

[41] Schanz, I, pp. 248–250.

[42] Walford, p. 21.

[43] Huvelin, p. 8.

[44] Mitchell, p. 5.

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[45] Above, p. 328. Huvelin, p. 281. "C'est à Alfred-le-Grand que l'on attribue l'honneur d'avoir institué les principales foires d'Angleterre. Il faut voir là plutôt une indication de date qu'un fait précis. C'est, en effet, à partir du IX^e^ siècle que nous voyons les foires anglaises naître et se multiplier."

[46] Above, pp. 135–137. Huvelin, pp. 143–205, *passim.* Morel, pp. 91–97.

[47] Maitland, *Domesday Book and Beyond,* p. 195. Holdsworth, *H.E.L.,* I, p. 535. Gross, *Select Cases, Law Merchant,* p. xvii.

[48] Maitland, *Domesday Book and Beyond,* p. 194. Bateson, II, pp. lxxiv–lxxv, for a law of Edgar. Holdsworth, *H.E.L.,* V, p. 103, n. 2.

[49] Huvelin, p. 459, n. 2, by a law of Edward the Confessor.

[50] Holdsworth, *H.E.L.,* I, p. 535; V, p. 103.

[51] Maitland, *op. cit.,* p. 194.

[52] Above, p. 329, n. 34.

[53] Huvelin, p. 281. "L'influence normande modela les foires saxonnes à l'exemple des foires françaises. Au moment de la conquête, en 1070, une foire existait déjà à Chester. Une foire fut concédée par Guillaume le Conquérant à l'évêque de Winchester; elle dut se tenir a la colline de St. Gilles." For the fair at Chester Huvelin cites Dugdale's *Monasticon Anglicanum.* But the 1846 edition, Vol. I, at pp. 371 and 386, is authority only for stating that such a fair existed in 1093 in Earl Hugh's time.

Finally, the right to hold the markets[54] and even to create burhs upon their own land was usurped by the great landowners at this period,[55] and the Crown did not recover them until the time of Edward I.[56]

The meaning and derivation of the words *market*[57] and *fair*[58] have been learnedly discussed by another author. At the common law there appears to have been no difference in the legal incidents attached to either a fair or a market;[59] and Coke stated that every fair was a market, but that every market was not a fair.[60] "A fair has accordingly been defined to be a great sort of market, which is usually kept once or twice in the year, and a market to be less than a fair, being usually kept once or twice in the week. The difference, therefore, seems to lie merely in the size or frequency of the gathering; and whether a particular gathering should be called a market or a fair must depend usually upon the term chosen for it in the instrument by which it is authorised. The two franchises are of equal dignity."[61] The markets never had any more than a very local importance, for they were not expected to draw from the countryside for a radius greater than six miles; it was to the annual fairs that commerce came. Of these latter the most important were those of Stourbridge, Stamford, Boston, Winchester, and St. Ives,[62] and since some of the records of the last named town's court have been preserved we shall shortly examine them at length. But first we must speak of a few of the general rights and privileges possessed by all English fairs.

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[54] Holdsworth, *H.E.L.*, V, p. 104.

[55] *Ib.*, I, p. 140.

[56] *Ib.*, I, pp. 87–90.

[57] Halsbury's *Digest*, XX, p. 4, note "a."

[58] *Ib.*, p. 4, note "h."

[59] *Ib.*, p. 4.

[60] 2 Co. Inst., 406, giving the reason why fairs are included in the term *mercatus* as used in Statute of Westm. II (1285), 13 Edw. I, c. 24. See also 2 Co. Inst., 221, on the term *marcha* as used in Stat. of Westm. I (1275), 3 Edw. 1, c. 31.

[61] Halsbury's *Digest*, XX, p. 5.

[62] Gross, *Select Cases, Law Merchant*, p. xxxiii. Von Ochenkowski, p. 156. "Die zerstreuten Käufer und Verkäufer versammelten sich auf Märkten und Jahrmärkten. Die Märkte wurden an sehr vielen Ortengehalten, und es hatte mehr oder weniger jeder grössere Grundherr auf seinem Gute einen Markt, welcher dem Bedürfnisse des Verkehrs entsprach, aber auch zugleich für ihn eine Quelle des Einkommensbildete. Wichtiger für den Verkehr waren die Jahrmärkte, wo schon die Ausländer mit den Inländern zusammenkamen. Die wichtigsten Jahrmärkte fanden in Sturbridge, Boston, St. Ives und Winchester Statt; andere Orte hatten aber auch ihre Jahrmärkte, und obwohl vielleicht nicht so bedeutende als jene, so wahrscheinlich doch nicht völlig bedeutungslose (Stamford, Portsmouth, Westminster, Abingdon, Northampton, St. Edmunds). So wie die Märkte an bestimmten Wochentagen gehalten wurden, sind diese blos ein Mal des Jahres, aber längere Zeit abgehatten worden (In Portsmouth der Wochenmarkt jeden Donnerstag, ebenso in Flint. In der ersten Stadt dauerte der Jahrmarkt 15 Tage, in der letzteren 8 Tage, in Sturbridge 3 Wochen, in Winchester 16 Tage u. s. w.)."

The market or fair was created by the Crown, by virtue of the royal prerogative, and it could always be granted to a subject, as was frequently done at this time.[63] When a market or fair depended on a grant from the Crown for its legal existence it was known as a franchise.[64] But the right of holding a market or fair was often usurped, and in such a case the Crown later began to reassert its rights by obtaining judgments of ouster following *quo warranto* inquiries.[65] If any one claimed such a franchise by prescription and then accepted a charter from the King making the same grant, it seems to have been the better opinion that the right by prescription merged and could not thereafter be claimed.[66] As early as the XIII Century the King also seems to have occasionally established a market or a fair by a royal ordinance, directed to the Sheriff, without granting it to any subject; this procedure was usually followed in a royal manor.[67] When granting a new market it was generally provided that it was not to injure any neighboring market, and such a clause came to be implied by law, even if it were not contained in the grant.[68] The market or fair or its tolls could be transferred or leased by a deed,[69] but the right of taking tolls was separate from and not consequent on the right to hold a market, and so it always existed as a separate right.[70]

The privileges granted had always to be very carefully exercised, since mis-user or non-user might subject the owner to payment of a fine to the king,[71] or even to forfeiture. The fair must only be held for its proper time, either according to the time named in the grant, or according to the time claimed by prescription, and at the beginning of the fair proclamation must be made as to its duration.[72] If held beyond that time the King might seize the fair and hold it until the payment of a fine.[73] Any merchants who made sales at the fair after that time were liable to forfeit to the King double the value of the goods sold.[74] More serious were the offences of neglect and of abuse, which made the franchise liable to forfeiture. Neglect of the right to take toll did not work a forfeiture either of that right or of the right to hold a market or a fair, but non-user of the market or of the fair did, and so did the repeated failure of the owner to fulfil his duty of providing accommodation for its holding.[75] In this same class fell the unauthorized change of the appointed day for holding it or its prolongation for additional days,[76] and, finally the taking of outrageous tolls by the owner.[77] But such a forfeiture did not work extinction in the hands of the King unless the original grant had been repealed by *scire facias*.[78] Besides the market tolls there were also dues in the nature of franchise tolls, sometimes payable in kind, which were collected on all goods brought into the market for sale, whether or not they were sold, and stallage was also payable.[79] The owner had an action for disturbance against those who disturbed his collection of tolls or those who prevented persons or goods from coming to the market.[80]

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[63] Halsbury's *Digest,* XX, pp. 6–7. Holdsworth, *H.E.L.,* I, p. 535; V, p. 104.

[64] Halsbury, XX, p. 7. Holdsworth, I, pp. 93, 535. Gross, *Select Cases, Law Merchant,* p. xvi.

[65] Halsbury, XX, pp. 50–51, and note "C." *Rex* v. *Anon* (1475), *Y. B.* 15 Edw. IV. fo. 7. *Rex* v. ——— (1682), 2 Show. 201. Holdsworth, *H.E.L.,* I, pp. 87–90.

[66] Halsbury, XX, p. 52. Apparently contra are *Anon.* (1506), *Y. B.* 21 Hen. VII, fo. 5, and *Goodson* v. *Duffield* (1612), *Cro. Jac.* 313.

[67] Halsbury, XX, pp. 6–7. For early instances of such creations *temp.* Johan, see *Rot. Chart.* I., i., 77 (Portsmouth), 135 (Marlborough); *temp.* Edw. II, *Calendar of Close Rolls* (1318–23), p. 166 (Woodstock), p. 173 (Middleton, Kent).

[68] Halsbury, XX, p. 7.

[69] *Ib.,* p. 13.

[70] *Ib.,* p. 6.

[71] *Ib.,* pp. 15–16.

C. 6 of the Statute of Winchester of 1285 enacted that fairs and markets must not be kept in churchyards "for the Honour of the Church," [81] and in 1448 a law was passed forbidding the holding of fairs on Sundays and on high feast days.[82] At an earlier period than on the Continent[83] England had arrived at a uniform weight and measure, for a charter of 1286 to foreign merchants declares "that one weight shall be kept in every fair and town; that the weigher shall show the buyer and seller that the beam and scales are fair, and that there shall be only one weight and measure in our dominions."[84] Moreover, the right of reprisals, at least as between Englishmen,[85] was abolished in 1275 by c. 23 of the Statute of Westminster I, which was intended to remedy the state of primitive justice which to a large extent arose out of these local jurisdictions. "Under it no foreign person—that is to say, one who was not free of the town he visited —which is of . . . England, was to be distrained for any debts but his own in any city, burgh, town, market or fair."[86]

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[72] Stat. of Northampton, 2 Edw. III, c. 15 (1328).

[73] "The Statute plainly contemplates a proceeding in the nature of office found, or *scire facias.*" *Middleton* v. *Power* (1886), 19 L. R. Ir. 1, *per* Chatterton, V. C., at p. 9.

[74] Stat. 5 Edw. III, c. 5 (1331).

[75] Halsbury, XX, p. 49.

[76] Stat. of Northampton, 2 Edw. III, c. 15, by which, after office found, the franchise is seized and held by the King until the owner has paid a fine for the offence, *Anon.* (1348), *Y. B.* 22 Edw. III, Ass. fol. 93, pl. 34, *per* Bankwel, J.

[77] Stat. of Westminster, I (1275), 3 Edw. I, c. 31. 2 Co. Inst. 219, 221.

[78] Halsbury, XX, p. 51.

[79] *Ib.*, pp. 35–37.

[80] *Ib.*, p. 43. *De Chaunce v. de Twenge* (1337), *Y. B.* 11 Edw. III (R. S.), p. 38. *Abbot Denesham's Case* (1355), *Y. B.* 29 Edw. III, fo. 18. *Gloucester Grammar School Case* (1410), *Y. B.* 11 Hen. IV, fo. 47, *per* Skrene, Serjeant.

[81] Stat. of Winton (1285), 13 Edw. I, st. 2, c. 6.

The right to hold the market, which was a franchise, also included the right to hold a court of piepowder,[87] just as the same right on the Continent included the right to hold a similar court.[88] Various explanations have been given of the name piepowder, but the best opinion derives it from the dusty feet (*pes pulvericatus*) of the chapmen who wandered from market to market.[89] It has also been derived from the old French for pedlar (*pied pulderaux*),[90] which appears to be a variant of the former. Even though the derivation which was accepted by Coke and Blackstone[91] be rejected, that it was so named because justice was done as speedily as the dust could fall from the feet of the litigants, it is still helpful as proving to us the universal opinion in regard to its most striking feature, the celerity of its procedure. In this particular respect it is mentioned by Bracton,[92] and there are many early references to it.[93] The evidence proves to us that these courts were of the same type as the other fair and market courts in Northern Europe to which we have referred above.[94] In many cases they were granted to boroughs in their charters, as well as to the lords of markets and fairs.[95]

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[82] Stat. 27 Hen. VI. c. 5.

[83] Huvelin, pp. 526–527.

[84] Walford, p. 25.

[85] Mitchell, p. 6, is not quite accurate when he states that this law included aliens. Aliens were not included until 1351 and 1353; Goldschmidt, pp. 121–122, n. 91. Maitland, *Select Pleas Manor. Cts.*, p. 135.

[86] Walford, pp. 23–24.

[87] Halsbury, XX, p. 5. Gross, *Select Cases, Law Merchant*, pp. xvi–xvii. Holdsworth, *H.E.L.*, I, pp. 535–536; V, p. 106.

[88] Huvelin, pp. 166–175. Goldschmidt, pp. 129–130.

[89] Gross, *Select Cases, Law Merchant*, pp. xiii–xiv.

[90] Halsbury, IX, p. 136, note.

[91] *Institutes*, II, 220; IV, 272. *Commentaries*, III, 32.

[92] Bracton, f. 334. "Personas qui celerem habere debent justitiam sicut sunt mercatores quibus exhibetur justitia pepoudrous."

[93] Gross, *Select Cases, Law Merchant*, p. xiv, n. 2.

The court was held before the mayor or bailiffs, if the market or fair belonged to a borough, or before the steward, if it belonged to a lord, and the mayor or steward was often assisted by sergeants or bailiffs.[96] Every mercantile court also had a clerk and a seal, and, since it was a court of record,[97] it kept plea rolls.[98] But one of the most important things about the court was the fact that it was the merchants themselves who declared the law and who acted as judges,[99] and here again the courts were truly international and were in line with the traditions of the commercial law over all Western Europe. When there was a jury it, too, might be composed of merchants,[100] half of whom, if one of the parties was a foreigner, might be composed of the foreign merchants.[101] In general, the jurisdiction of these courts was very considerable. It extended to all civil cases except those concerning land;[102] to all except the more important criminal cases,[103] including all police offences, for the borough or the lord was responsible for maintaining order during the fair;[104] and also to violation of the various regulations of the fair in regard to methods of sales, weights, measures, and breaches of the assize of bread and beer.[105] Originally the jurisdiction of these courts extended to matters done outside the limits of the fair, or at a previous fair,[106] but in 1477 it was enacted that their jurisdiction should be limited to matters happening within the fair and only during the time of the fair for which the court was held,[107] although the judgment itself could be deferred until a subsequent fair.[108] If a defendant pleaded that the same matter was *res adjudicata* in another court, the instance court would write to the other court to inquire, and there were regular forms drawn up for such inquiries.[109] The jurisdiction of these courts was not limited by the amount in litigation.[110] They were authorized to sit only on the day for which the market or fair was granted by charter, and not on some other day, if the market or fair was held then.[111] The courts especially decided in respect of contracts, trespasses, covenants, breaches of warranty, sales, and debts, and, as we shall see, obligatory writings of debt were not unknown.[112] Moreover, like the other courts at this period, these courts acted to protect their own jurisdiction by providing against the bringing of suit elsewhere.[113] If it appeared that the cause of action lay outside the jurisdiction of the court, the plaintiff was sent for his remedy to the ordinary courts.[114] There appears to have been some doubt over the matter of appeals, but it was usually recognized that it lay to the courts at Westminster.[115] It was occasionally denied,[116] and our examination of the

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[94] Above, pp. 130–178, *passim*. Holdsworth, *H.E.L.*, I, p. 536.

[95] Gross, *Select Cases, Law Merchant*, pp. xviii, xx.

[96] *Ib.*, pp. xxii–xxiii. Bickley, I, pp. 59, 70, 71.

[97] Halsbury, IX, p. 136. *L. Q. R.* XVII, p. 236.

[98] Gross, *Select Cases, Law Merchant*, p. xxiii. *E. H. R.*, XXXVII, p. 244. Bickley, I, pp. 70, 77. "Statutum est quod omne mercatum habeat vnum commune sigillum."

[99] Bickley, I, p. 70, "In omni curia mercati singula iudicia reddi debent per mercatores eiusdam Curie et non per maiorem nec per senescallum mercati." Maitland, *Select Pleas Manor. Cts.*, pp. 133, 153: all the merchants of the communities of St. Ives are summoned to hear and adjudge a case. Gross, *Select Cases, Law Merchant*, pp. xxv, xxxv, 25, 30, 65, 86, 91, 90: according to this latter, "all the merchants of the said fair, both natives and foreigners, to whom judgments belong according to the law merchant" are called together to give judgment; this principle was also admitted in the king's courts. Plac. Abbrev. 321 (1315). Pollock and Maitland, *H. E. L.*, 2nd ed., I, p. 467. Mitchell, pp. 73, 156. Holdsworth, *H. E. L.*, I, p. 536. Maitland, *Select Pleas Manor. Cts.*, p. 132.

[100] *Munimenta Gildhallæ* (Rolls Series), I, p. 216. *E. H. R.*, XXXVII, pp. 245–246. Below, p. 339.

[101] 27 Edw. III, st. 2, c. 8; 28 Edw. III, c. 13; *Carta Mercatoria*, c. 8.

[102] Gross, *Select Cases, Law Merchant*, p. xxiv. *L. Q. R.*, XVII, p. 237, n. 3. *E. H. R.*, XXXVII, p. 243.

[103] But there were a few exceptions, as at Winchester and Chester, Gross, *Select Cases, Law Merchant*, p. xxiv, notes 5 and 6.

[104] *Ib.*, pp. xxi–xxii, xxxiv. At St. Ives there was a constabulary force

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raised from the borough and the nearby manors in rotation, quite like a feudal levy. The officials of the Continental fairs had similar duties.

[105] *Ib.*, p. xxiv. There are a great many such cases in the records.

[106] *Ib.*, p. xxiv. Bickley, I, p. 70. "Cum placitum moueatur in Curia seu foro mercati de re facta extra limites mercati non propter hoc non dimittatur quin ibidem discuciatur placitum." *E. H. R.*, XXXVII, p. 246.

[107] Stat. 17 Edw. IV, c. 2. This was the Continental usage, Morel, 96.

[108] Gross, *Select Cases, Law Merchant*, p. xxv. Bickley, I, pp. 57, 63.

[109] Bickley, I, pp. 80–85.

[110] *Ib.*, I, p. 59. Gross, *Select Cases, Law Merchant*, p. xxiv.

[111] Halsbury IX, p. 136. *Y. B.* 22 Edw. IV, 33 (B). They did not sit on Sundays, Gross, *Select Cases, Law Merchant*, p. xxxiv.

[112] Below, p. 348.

[113] Walford, pp. 60–61. But a few years later Bickley, I, p. 58, says the withdrawal of cases is common.

[114] Halsbury, IX, p. 136.

[115] Gross, *Select Cases, Law Merchant*, pp. xviii, xxv. Bickley, I, pp. 57, 70. The latter suggests a writ of transgression in the common law courts for an irregular judgment. Holdsworth, *H. E. L.*, V, p. 106–107. In 1419 London forbade appeals from cases decided by the Law Merchant: Bateson, II, p. 192.

[116] *L. Q. R.*, XVII, p. 237, n. 3. Gross, *Select Cases, Law Merchant*, p. xviii.

restrictions which hedged it in on the Continent [117] and the dislike with which it was viewed by those using the courts of Admiralty [118] lead us to conclude that the right was probably utilized but seldom.

Now, in common with all the similar Continental courts, the courts of piepowder took especial cognizance of cases in which a foreigner, a wayfarer, or a seaman was a party,[119] and this, as on the Continent, led to a swift, summary, and informal procedure,[120] and for exactly the same reasons. This was one of the most striking [121] and oldest features of the court,[122] and the records show us that the need for celerity in deciding such cases was fully appreciated.[123] The ordinary rules of procedure, which would have hampered such a trial, were therefore considerably relaxed.[124] Sometimes the courts sat continuously,[125] and sometimes there was one session in the morning and another in the afternoon.[126] As early as the XII Century it had been required that the pleas concerning wayfaring merchants should be settled before the third tide, and this is a requirement which is often met later.[127] Pleas were begun without a writ, formalities were done away with, and an answer had to be made within a day, or within a tide, or even within an hour.[128] In the same fashion pleas were adjourned from day to day and from hour to hour,[129] and this was recognized by the common law courts in 1461.[130] If the defendant did not appear after being summoned, his goods were attached, and sometimes they were appraised and sold immediately,[131] but usually they were held for a year and a day before being sold.[132] As early as the time of Bracton it was recognized that in such cases a fifteen days' summons was not necessary, nor need the solemn order of attachments be followed in such cases *propter privilegium et favorem mercatorum*.[133] The costs and expenses fell on whichever party lost the suit.[134] Our information in regard to lawyers is scanty but it shows us that they were in use even in these courts, contrary to the practice which we have seen prevailed on the Continent; [135] at Cambridge the local advocates were forbidden to appear on behalf of any foreigner.[136] It is plain that they practiced in the borough courts.[137]

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[117] Above, p. 198. Goldschmidt, p. 175. Morel, pp. 72–74, 162–163, 214. Mitchell, p. 13.

[118] Above, p. 306.

[119] Gross, *Select Cases, Law Merchant*, p. xxiii. Bickley, I, p. 68. Bateson, II, p. lxxxv. Cf. *Munimenta Gildhallæ* (Rolls Series), I, pp. 295–296.

[120] Gross, *Select Cases, Law Merchant*, pp. xxv–xxvi and many references there cited. Bickley, I, pp. 57, 58. *Munimenta Gildhallæ* (Rolls Series), I, 67, 173, 295–296, 390; II, pt. I, 207–208. Bateson, II, pp. 183–185. Halsbury, IX, p. 136. Cf. above, p. 270.

[121] Gross, *Select Cases, Law Merchant*, p. xxv. Holdsworth, *H. E. L.*, V, pp. 63, 81–82.

[122] From the XII Century on, Gross, *Select Cases, Law Merchant*, p. xxv, n. 7; *ib.* p. xxvi, n. 1.

[123] "Personas qui celerem habere debent justitiam," Bracton, f. 334. *Black Bk. of Adm.*, II, p. 23. *Munimenta Gildhallæ* (Rolls Series), I, pp. 295–296.

[124] Holdsworth, *H. E. L.*, I, p. 537; V, p. 106. Gross, *Select Cases, Law Merchant*, p. xxvi.

[125] Bickley, I, p. 57: "ideo lex ista consequitur se ipsam continue." Holdsworth, *H. E. L.*, I, p. 537.

[126] Gross, *Select Cases, Law Merchant*, pp. xxxiii, xxxvii. *Black Bk. of Adm.*, II, pp. 22–23. Bateson, II, pp. 189–190.

[127] Bateson, II, pp. 184–185. Stubbs, pp. 133–134.

[128] Halsbury, IX, p. 136. Holdsworth, *H. E. L.*, V, pp. 106–107. Gross, *Select Cases, Law Merchant*, p. xxvi.

[129] Halsbury, IX, p. 136. Gross, *Select Cases, Law Merchant*, pp. xxiii, xxvi, 122–125. *Black Bk. of Adm.*, II, pp. 22–23. Bickley, I, p. 58. Bateson, II, pp. 183–185.

The method of proof and of trial was slowly changing.[138] If the parties proceeded by a jury, the jury itself might have to be composed of merchants,[139] and if the procedure was by way of compurgation the old formal oath was not enough and the *secta* were treated more as a group of witnesses; they were examined by the court, and might even be examined individually if collusion was suspected.[140] In the trial of merchants' contracts, even where they were not evidenced by tallies or writing, compurgation was not permitted in disproof, because to require tallies or writing would be a burden and a hindrance to trade.[141] An excellent idea of the actual working of a court of piepowder is given by a case tried in Colchester in 1458.[142] The plaintiff brought suit at 8 A. M. to recover a debt, and the defendant was summoned to appear at 9; he did not come, and the sergeant was sent for him at 10. There were similar defaults at 11 and at 12; then judgment was given for the plaintiff and it was ordered that the property of the defendant, which had been attached, should be appraised. This was done by 4 P. M. when the goods were delivered to the plaintiff. For general legal routine it is very interesting to compare this case with that of *Sampson c. Curteys,* which came up in the Court of the Admiral of the West in 1391.[143]

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[130] *Coram Reg. Roll,* 802, m. 87a. "Secundum naturam curie pedis pulverisati processum fieri debet de hora in horam a die in diem et non ulterius."

[131] Bickley, I, p. 60.

[132] Gross, *Select Cases, Law Merchant,* p. xxvi. Bateson, II, pp. 190–191.

[133] Bracton, f. 444.

[134] Bickley, I, pp. 65–67.

[135] Above, p. 196.

[136] Walford, p. 61. See also Gross, *Select Cases, Law Merchant,* p. xxxiv and references there to the cases.

[137] Bateson, II, pp. clii–cliii, 10–16. Maitland, *Select Pleas Manor. Cts.,* pp. 135–136.

[138] Holdsworth, *H. E. L.,* V, p. 107.

[139] In London, *E. H. R.,* XXXVII, pp. 245–246. Expressions are used which seem to indicate that this was sometimes the custom at the fair of St. Ives, Gross, *Select Cases, Law Merchant,* pp. 85, 86, 91. Above, p. 336.

[140] Bickley, I, pp. 63–65. Gross, *Select Cases, Law Merchant,* p. 118.

[141] Bickley, I, p. 69. This was the rule elsewhere, Bateson, II, pp. 188–189. For tallies see *Munimenta Gildhallæ* (Rolls Series), I, p. 294.

[142] Gross, *Select Cases, Law Merchant,* pp. 122–125.

We next come to the matter of the borough courts. Where a fair or a market was held in a borough it would usually have a court of piepowder during its continuance, and when there was another borough court as well, the jurisdiction of the latter was sometimes superseded by the former.[144] The two courts are clearly distinguishable, and the royal mediæval lawyer seems to have considered the court of piepowder as a special and peculiar tribunal,[145] entitled to be held only during the time of the market or fair, for a case shows us that the lawyers thought that pleas held in a court of piepowder should make mention of the holding of the fair or of the market.[146] But at the same time, there was also a tendency to merge the one court with the other. At Gloucester and at Bristol the two courts were very closely connected and perhaps were identical,[147] and at a number of other places when a case was removed from a borough court to a piepowder court "nothing [was] altered but the title or style of the court." [148] In such a case, the records of the latter were sometimes entered on the rolls of the former, as if the one were regarded as a mere special session of the other,[149] exactly like the modern practice when a United States District Court sits as a Court of Admiralty. Because of this local confusion the principle was established that even if there were no market or fair a borough might have a court of piepowder.[150] And, on the other hand, the borough courts might sit from day to day in fair time.[151]

Because of the very similarity of the borough court to the court of piepowder its consideration in regard to our purposes need not detain us long. We have spoken above of the local courts which, situated in a seaport town, had a maritime jurisdiction,[152] and what we have said of them is generally characteristic of all. The chief and most striking point is still the quick, prompt, summary nature of the procedure, wherein they are at one with all the other similar courts of Europe.[153] In this respect and in the general nature of their procedure and in the principles of the law administered they seem to have been quite like the courts of piepowder.[154] Sometimes the only difference appears to be that a foreigner cannot sue in a borough court, but must sue in a court of piepowder.[155] But in general, just as it seems to have been the local courts which originally administered the maritime law to the seamen, so does it appear to be the local courts which, with the fair courts, originally administered the commercial law to foreigners.

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[143] See p. 306. above.

[144] *L. Q. R.*, XVII, p. 237, n. 3. Gross, *Select Cases, Law Merchant,* pp. xxi–xxii.

[145] Gross, *Select Cases, Law Merchant,* pp. xx–xxi.

[146] *Coram Reg. Roll,* 802, m. 87a. 1 Edw. IV.

[147] Gross, *Select Cases, Law Merchant,* p. xxi.

[148] *Ib.*, p. xx, n. 3.

[149] *L. Q. R.*, XVII, p. 237, n. 3.

[150] *Y. B.* 13 Edw. IV., f. 8. Coke, IV, 272.

[151] Gross, *Select Cases, Law Merchant,* pp. xx.

We must at once qualify the word "foreigner." We use it as it would have been used at the beginning of the XIII Century, and apply it to all those, whether denizen or alien, who are not free of the town in which they happen to be at the moment. By the XIV Century the denizen's status apparently had been assimilated to that of the citizen, and the alien was acquiring special charters and privileges. There would, of course, have been variations from place to place. In general, the courts of the boroughs seem to have been less important for our purposes than those of the fairs, if we may judge by the contents of the borough custumals, which concern themselves comparatively little with foreigners (who frequently may have been denizens), and, when they do, their provisions are mostly in regard to the procedure to be followed in their trials, or the formalities involved in speedy collection of their debts.[156]

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[152] Above, p. 268 *et seqq.*

[153] *Select Essays Angl. Amer. Law,* III, pp. 35–36.

[154] Miss Bateson in her *Borough Customs,* II, pp. 183–192, prints without distinction provisions in regard to both borough courts and courts of piepowder, and, indeed, the provisions are very much the same.

[155] *Ib.,* pp. 189–190. Cf. *Black Bk. of Adm.,* II, pp. 20–25.

[156] We give a short digest of all the references to be found in the list of custumals printed in Bateson, I, pp. xviii–lvi.

P. xx—Bristol, before 1241. 13. Pleas of merchants and sailors. 14. Foreigner's *secta.* 15. Foreigner's tally. 16. Foreigner's defence. 18. Pleas between a burgess and foreigner.

P. xxii—Cork. 16. Stranger's courts.

P. xxxii—Dover. 24, § 2. Proof by law merchant.

P. xxv—Dublin and Waterford, about 1300. 68. Payment of foreign merchants.

P. xxvii—Exeter, *circa* 1282. 31. Pleas between residents and foreigners.

> "Many matters of the first importance to merchants fail to find notice in the borough custumals. Merchant law appears in these codes as only a subsection, chiefly interesting to the clerk of the borough court for the forms of its piepowder court, its rapid procedure, its arrangements for the foreigner, and the trader travelling from place to place. That our custumals have so little to tell . . . seems to show that if market law could once claim a big share in the making of borough law, the larger commerce of a later time was sending its stock of legal ideas into another channel."[157]

With the conduct of both of these types of courts the Gild Merchant was frequently intimately concerned, for the burgesses of a town and the members of a gild were often essentially the same people.[158] We have already spoken of the gilds as established on the Continent, and especially in the great mercantile cities.[159] The same causes that were at work in the field of the organization and triumph of the royal courts in England were at work in the field of the gilds, and, just as we have seen that the early commercial courts of England were not as strong or as powerful as elsewhere, so we shall see that the gilds of England never acquired quite the same strength or the sweeping privileges that those on the Continent did.

> "This divergence of development was due to a cause which made the whole course of continental municipal history different from that of England, a cause whose effects are still indelibly written in the rock and marble of castle, belfry, and *hôtel de ville*—I mean the weakness of royal authority on the Continent. If the English sovereign in the twelfth century was not 'every inch a king,' he was by several inches

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P. xxvii—Fordwich, *circa* 1450. 14, § 1. Sale of land to foreigners, p. xxviii. 59. Strangers' speedy justice. 81. Sailors' law.

P. xxix—Godmanchester. 12. Fine for letting fald to foreigners. 17. Penalty for alienating land to foreigners. 18. Exclusion of foreigners from the pasture.

Pp. xxxv–vi—Kilkenny, 1383. 33. Foreign merchants.

Pp. xxxviii–ix—Lydd. 66. Bailiffs' control of foreigners. MSS. *circa* 1476.

P. xl—Newcastle-under-Lyme. 10. Exclusion of foreigners from privilege of inheritance of burgess-ship.

P. xlvi—Portsmouth, *circa* 1270. 12. Sale of cargo.

P. xlvii–viii—New Romney, *circa* 1352. 9. Freeman's power to distrain foreign debtors.

P. li—Taunton, late XIV Century. 1–4. Exclusion of foreigners from trades.

Pp. lii–iii—Torksey, XV Century. 4. Burgess' power to distrain foreigners. 24. No foreigners on inquests. 34. Foreign merchandise.

P. lv—Winchelsea, XV Century. 24. Pleas between foreigners. No mention of pleas between foreigners and natives.

[157] Bateson, I, pp. lxxxiv–lxxxv.

[158] Gross, *Gild Merchant,* I, pp. 74–76.

[159] Above, p. 141 *et seqq.*

more a king than the other rulers of Western Europe. On the continent, towns became small republics, even more independent than the feudal lords; in England they remained integral portions of the body politic over which the king ruled. The former frequently secured the privilege *de non appellando,* almost complete judicial autonomy; the latter were always, more or less, under the control of the king's courts. Richard I's jest, that he would sell London if he could find a buyer, is not meaningless; the most potent of the English boroughs were at times abjectly humbled by the royal will."[160]

It was the strength of the central government, at least by comparison, that made the course of legal and institutional government different in England, and to this we must always remember to add that commerce itself was more backward and was smaller than elsewhere, so that the insistence of its needs was not so great. We have already made a brief reference to the Anglo-Saxon gilds[161] which, in their nature and in their purposes, seem to have been somewhat like, and analogous to, the Roman religious and burial corporations,[162] but these early Anglo-Saxon gilds were not true merchant gilds and they did not participate in town government in any way.[163] Their history really begins after the Norman Conquest,[164] and we find them spoken of as in existence or being created during the XII Century.[165]

The gild was an organization of traders within a town, usually associated as an entire group, but not infrequently according to trades or "mysteries," for the management and for the control of trade.[166] It sometimes included outsiders, but only by special consent,[167] and, as we shall soon see, it was generally very hostile to them and it restricted them and attacked their privileges in every possible way. In the field of production and of administration, such as in its regulation of the conditions in workshops, the instruction of apprentices, the methods of manufacture, and the standards to which the finished product must conform, the gilds undoubtedly filled a real economic need, but in general their methods rather tended to approach those of a trade union at its worst, in creating a narrow and privileged class.[168] Only those belonging to the gild were permitted to trade in a town, except under special restrictions which were sometimes so oppressive that trade was driven away.[169] When we come to consider the alien merchants we shall have more to say of this side of the gilds, which, to us, is the most important,[170] and so we shall now content ourselves with saying that their privileges were sometimes used in a very short-sighted and harmful way from the point of view of the national interests. When we think, for instance, of the Florentine gilds we might expect great things of the English gilds, unless we remember that the strong royal power which had limited the power of the town and of its court limited also that of the gilds. The gild could originally be distinguished from the borough,[171] but in the XIV Century they sometimes tended to merge,[172] just as we have seen that at an earlier period in Northern Europe the merchant and the burgess tended to become one.[173] In this sense, one may perhaps think of the borough and piepowder courts as being courts for the gild, but, although they sometimes sat in arbitration on mercantile disputes,[174] the gilds as such never possessed a true commercial jurisdiction.[175]

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[160] Gross, *Gild Merchant,* I, pp. 279–280.

[161] Above, p. 328.

[162] Goldsmith, pp. 69, 87, 158–159.

[163] Gross, *Gild Merchant,* I, pp. 2, 174–178.

[164] *Ib.,* pp. 2–3. Gross perhaps a trifle too generously gives the credit for their further development to the expansion of trade after the Norman Conquest. "The history of the Gild Merchant begins with the Norman Conquest. The latter widened the horizon of the English merchant even more than that of the English annalist. The close union between England and Normandy led to an increase in foreign commerce, which in turn must have greatly stimulated internal trade and industry. Moreover, the greatly enhanced power of the English crown tempered feudal turbulence, affording a measure of security to traders in England that was as yet unknown on the continent. . . . The improved communication with the continent and the augmentation of internal security by a strong central power soon expanded trade and industry far beyond the narrow limits by which they were circumscribed in Anglo-Saxon times."

[165] Ib., I, pp. 5 *et seqq.* Stubbs, pp. 196, 197, 260–261, 309, 310.

[166] Walford, p. 66. Gross, *Gild Merchant,* I, Ch. iii, pp. 36–52.

[167] Gross, *Gild Merchant,* p. 43. "The words, 'so that no one who is not of the Gild may trade in the said town except with the consent of the burgesses,' which

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frequently accompanied the grant of a Gild Merchant, express the essence of this institution."

[168] *L. Q. R.*, XVII, p. 238. Gross, *Gild Merchant*, I, pp. 43–50.

[169] Gross, *Gild Merchant*, pp. 51–52, and the gild statutes there cited.

[170] Below, p. 385.

[171] Gross, *Gild Merchant*, I, pp. 61–72.

[172] *Ib.*, pp. 74–76, 103–105. Maitland, *Select Pleas Manor. Cts.*, p. 135.

[173] Above, pp. 172–173.

[174] *L. Q. R.*, XVII, p. 238.

[175] Gross, *Gild Merchant*, I, p. 65. "The judicial authority of the Gild Merchant was at first doubtless very limited, its officers forming a tribunal of arbitration, at which the brethren were expected to appear before carrying their quarrels into the ordinary courts. The functions of these officers were inquisitorial rather than judicial. But, in some places, their powers appear to have been gradually enlarged during the thirteenth century so as to embrace jurisdiction in pleas relating to trade"; citing many references in his Vol. II, of which the chief is from the Gild Rolls of Andover. But these cases, when examined, show no true commercial jurisdiction, only petty offences of gild

But in an indirect way the gilds have a considerable importance for us. Their very exclusiveness and the strength of their organization made it plain to Englishmen that the merchant was a man set apart and belonging to a definite class, so that we are not surprised to know that at the beginning of the XIV Century they very nearly came to constitute a legally recognized and separate class, like the clergy.[176] We must remember, however, that at this period the word "merchant" was used in a distinctly broader sense than it would be today, and that it included small retailers and many independent artisans.[177] One of the most important of the rights of these merchants was the right of settling their commercial disputes by the special law used in the borough and piepowder courts: [178] the law merchant, the *lex mercatoria,*[179] based upon the customary law of the borough courts,[180] possessed in some degree peculiar local characteristics,[181] and yet in its broad lines it was international and similar to the same law whose developments we have traced on the Continent.[182] But this law was not limited in its application to the members of the gilds, since even the status of a merchant was not solely confined to them. Nor, whatever may have been the later state of the law,[183] had the law merchant yet

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discipline in matters of selling, buying, etc., and of poor manufacture; a general violation of various gild regulations, a small personal quarrel, or not coming to the gild officials first in the attempt to patch up a quarrel *before suing at law,* ib., II, p. 65. There are no real mercantile transactions of any importance, no genuine mercantile contracts, no mention of procedure or even of a *lex mercatoria, ib.,* II, p. 290–336.

[176] Stubbs, *Const. Hist. Eng.,* II, p. 191.

[177] Gross, *Gild Merchant,* I, p. 157. "There appear to be three stages in the history of the word 'merchant.' At first it embraced all who, in their trade, were in any way concerned with buying and selling, including petty shopkeepers and many handicraftsmen. During the fifteenth and the greater part of the sixteenth century it applied pre-eminently to all who made a business of buying for resale—retailers as well as wholesalers—manual craftsmen not being included. It then came to have its present signification of an extensive dealer. In conception, the old Gild Merchant represents the first stage; the Companies of Merchants, the second; the Staplers and Merchant Adventurers, the third."

[178] Mitchell, p. 81. Bickley, I pp. 68–69.

[179] See above, p. 125, and Gross, *Select Cases, Law Merchant, passim;* the XV Century treatise by that name in Bickley, I, pp. 57–85; Malynes' XVII Century book by that name; Maitland, *Select Pleas, Manor. Cts.,* p. 133; Holdsworth, *H.E.L.,* I, p. 541, for some uses of the phrase.

[180] Holdsworth, *H.E.L.,* I, p. 538; V, p. 104. *L. Q. R.,* XVII, p. 235.

[181] Mitchell, pp. 6–7.

[182] Maitland, *Select Pleas, Manor. Cts.,* p. 133. Pollock and Maitland, *H.E.L.,* 2nd ed., II, p. 467. Above, p. xvi. *L. Q. R.,* XVII, p. 232.

[183] Mitchell, p. 82.

become the privilege of an exclusive class of men; it was rather the law governing a certain class of transactions.[184]

The law merchant, then, was not the exclusive property of the members of the gilds, and its benefits could be claimed by others. We must, therefore, next examine the contents of the early English law merchant, and we shall find that what was true of the early courts is also true of the early law which was administered in those same courts. It is in a somewhat arrested state of development, and in the content of the law we are not able to trace any great amount of Continental loaning until the XVI Century.[185] Its principles, as far as they go, are common to the Continent and reflect the body of the *lex mercatoria,* but they are principles of an earlier period of development and do not seem to reflect the advances made on the Continent in the XIV and XV Centuries. As Miss Bateson has well suggested, and as we shall see, "the larger commerce of a later time was sending its stock of legal ideas into another channel," [186] and not into the courts of the markets, fairs, and boroughs. But even at an earlier time the commercial cases which came before the local courts appear for the most part to have been unimportant and very local, and this could not help but be mirrored in the law which these courts applied.[187] For this there is a reason, which we shall see when we next turn to examine the history of the foreign merchants in England. Sometimes these merchants stood quite outside the laws of England and were governed by their own law, which, as we have seen,[188] was equivalent to the general mediæval usage; sometimes they came before the specially erected court of the Staple; and sometimes they sought speedy redress from the Chancellor or the Council, as we have seen them doing in the previous chapter; but seldom, if at all, did they come before the local courts, which were thus deprived of the most important and most progressive source of business.

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[184] Bickley, I, pp. 57–58. Pollock and Maitland, *H.E.L.,* 2nd ed., II, pp. 466–467. "Ought we to reckon merchants of all kinds, English and foreign, as forming one of the sorts or conditions of men known to the law? Hardly, though as the historian of our constitution has shown, they nearly become for political purposes one of the estates of the realm. Stubbs, § 195. Still they do not become this. Then in private law 'merchantship,' if we may make that word, seems too indefinite and also seems to have too few legal consequences to permit of our calling it a status. We might illustrate this from modern law. . . . Before the end of the thirteenth century 'the law merchant' was already conceived as a body of rules which stood apart from the common law. But it seems to have been rather a special law for mercantile transactions than a special law for merchants. It would we think have been found chiefly to consist of what would now be called rules of evidence, rules about the proof to be given of sales and other contracts, rules as to the legal value of the tally and the God's penny; for example, the law merchant took one view of the effect of an 'earnest,' the common law another. These special mercantile rules were conceived as being specially known to merchants; in the courts of fairs and markets the assembled merchants declare the law, in Edward II's day twelve merchants are summoned from each of four cities to testify before the king's bench about a doubtful point in the 'lex mercatoria.' Also these rules are not conceived to be purely English law; they are, we may say, a *ius gentium* known to merchants throughout Christendom, and could we now recover them we might find some which had their origin on the coasts of the Mediterranean. But this is not the place for their discussion, for we take the law merchant to be not so much the law for a class of men as the law for a class of transactions."

[185] Holdsworth, *H.E.L.,* V. 102.

[186] Bateson, II, p. lxxxv.

In the field of insurance, for instance, we find absolutely nothing, nor does the charter-party seem to be mentioned, and we know practically nothing about negotiable paper as used among Englishmen,[189] except that it was known to a few of them. Yet as early as 1201 there is a letter of credit of King John's which asks all merchants to extend credit to two emissaries of his and which agrees to pay back the money in the form of a loan.[190] And since we meet with the mention of many more such letters of credit at this period [191] we can conclude that it may have been known for some time.[192] But a far more convincing proof than this can be given. One of the earliest acts of King John, after he came to the throne in 1199, was to promise to pay to certain merchants of Piacenza sums of money which they had advanced to English ambassadors at Rome by the order of Richard I, and the record which has been preserved of this transaction seems to us to preserve the exact form of the promissory notes actually given. It may be compared with the earliest bills of exchange which we have given above, as a proof of the fact that these bills were known and used in England, at least by the King and his Exchequer, before the end of the XII [193] Century. Letters of credit were also sometimes issued in the name of the King for the benefit of his subjects, who were thus enabled to raise loans upon a known security. In such a case letters of indemnity were made out to the King in order to protect him against any loss. This never became a custom, though such letters of credit are not infrequent.[194] The funds of Italian bankers were also used by private individuals, by attornies going to Rome to sue in the courts there, and by clerics travelling on the business of their home organizations, as letters dating from 1205 show.[195] This does not show us any usage by English merchants, but it does show us that the developing forms of commercial paper were in use in England among the Italians and their clients right from the beginning. As early as 1235 bills of exchange payable to order are known in England;[196] and beginning with the year 1290 we find the Italians using drafts among themselves and carrying on a business of remittance from England and Scotland to the fairs of Champagne and to Italy.[197] Almost none of this seems to have filtered through to the early English law merchant. Writings obligatory (*scripta obligatoria*) are to be found in the records of the fair courts of St. Ives from 1275 onwards;[198] and we see that in common with the Italian paper they, too, possess an order clause (*ei vel suo attornato presens scriptum deferenti*), but the resemblance ends there. A copy of one of these writings has been preserved[199] and serves to show us the lack of close relationship. The form is not like the Italian form; it is long, contains a special execution and penalty clause, and obviously does not contemplate negotiability of even the most limited sort. This follows as a corollary of the most important point, that without exception all the writings obligatory that we have are neither loans nor exchanges of money, as in Italy, but are merely a written security for the payment involved in a bona fide sale of goods. In 1299 this form was used by King Edward I in the acknowledgment of an existing debt.[200] It seems plain that, just as in earlier Italy, the certain attorney had to be indicated in a separate instrument and that mere possession of the writing by which the debt was proved in no way involved possession of the debt itself.[201] Even when appointed, the powers of the

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[187] Holdsworth, *H.E.L.*, V, pp. 113–114. "The great bulk of the cases which came before the courts of our English fairs and boroughs were concerned with the smaller transactions of internal trade. Naturally these commercial facts reacted upon the law administered in their courts. The impression which the published records of our fair courts leaves upon me is that they were courts which dealt for the most part with petty transactions, and that consequently, the law there administered had not much chance to develop. . . . Neither in our fair nor in our borough records do we read much of the beginnings of those legal doctrines of our modern commercial law which were beginning to spread from Italy and south-western Europe to the great fairs of France and the trading cities of the Netherlands."

[188] Above, p. 148.

[189] Bateson, II, p. lxxxv. Holdsworth, *H.E.L.*, V, p. 114. Comepare Maitland's vagueness, *Select Pleas Manor. Cts.*, pp. 132–133.

[190] Letters of credit are usually in the following form, which dates from 1201: "Johannes, Dei gratia, *etc.* Universis mercatoribus has litteras inspecturis Salutem. Noverit universitas vestra quod nos latores præsentium, Hugonem de Feritate et Robertum de Sablenc', pro negotiis nostris promovendis ad Romanam curiam destinamus, et mercatoribus a quibus pecuniam usque ad D. marcas argenti pro ipsis negotiis promovendis mutuo acceperint, ipsam pecuniam persolvere tenebimur: et nos per præsentes litteras principales super hoc constituimus debitores, et, termino statuto, secundum conventionem inter prædictos clericos nostros et mercatores factam, illis qui præsentes litteras nobis vel mandato nostro reddent, una cum litteris prædictorum clericorum potentibus summam pecuniæ mutuo acceptæ protestantibus, pecuniam ex integro faciemus persolvi. Teste me ipso," *etc. Rot. Pat.*, p. 4.

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[191] A long series of similar instruments can be collected from the pages of the printed Patent and Charter Rolls of the reign of John. *Rot. Chart.*, pp. 97, 98, 99. *Rot. Pat.*, pp. 5, 6, 9, 10, 39, 65, 67, 107, 182.

[192] Bond, *Archæologia*, Vol. 28, p. 217.

[193] We have italicized the portion which refers to a bill of exchange: "Johannes, Dei gratia, Rex, *etc.* dilectis amicis suis Speren', Barageton' et eorum sociis, mercatoribus Placentinis, salutem. Sciatis quod vobis solvere volumus duo milia marcarum et CXXV marcas, quas, pro amore bonæ memoriæ Regis Ricardi fratris nostri, et ex mandato ipsius, mutuo concessistis Willielmo Andegavensi et R. Bangorensi episcopis, et Stephano Ridel, ad negotium karissimi nepotis nostri illustris Regis Othonis in curia Romana faciendum. Ideoque vobis præsentibus litteris in tantam pecuniam nos obligamus; *promittentes quod, ad proximum festum S. Michælis post coronationem nostram, vobis vel certo nuntio vestro præsentes litteras afferenti et exhibenti sexcentas et viginti quinque marcas apud scaccarium nostrum in Anglia solvi faciemus;* et ad proximum sequens Pascha quingentas marcas ibidem, et postmodum in sequenti festo S. Michælis quingentas marcas ibidem, et ad proximum sequens Pascha quingentas marcas similiter ad scaccarium nostrum in Anglia solvi faciemus vobis vel certo nuntio vestro, litteras obligationis nostræ exhibenti. Et, nihilominus, ita vobis in gratiarum actione pro benigna expectatione vestra, favente Domino, respondebimus, quod expectatio vestra vobis non videbitur onerosa. Teste me ipso, *etc.*" *Rot. Chart.*, p. 31.

[194] Bond, Archæologia, Vol. 28, pp. 217–218.

[195] "Rex omnibus mercatoribus ad quos, *etc.* Sciatis quod concessimus et volumus quod pecunia quam Walterus et Adam et magister Martinus, nuntii Glastoniensis ecclesiæ, vel duo eorum, mutuo ceperint de mercatoribus, usque

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ad summam septingentarum marcarum, pro negotiis ecclesiæ pro quibus ad Sedem Apostolicam missi sunt, persolvatur de rebus et possessionibus prioris et conventus Glastoniæ. Et concedimus quod mercatores qui prædictis nuntiis prædictum mutuum fecerint, vel eorumdem mercatorum nuntii, qui cum presentibus litteris et litteris prædictorum nuntiorum Glastoniensium mutuum illud testantibus in Angliam venerint pro pecunia sua recipienda, salvum et securum conductum in veniendo et redeundo habeant. Teste me ipso, *etc.*" *Rot. Pat.* p. 56.

[196] Goldschmidt, pp. 391–392, n. 30, "dictis mercatoribus vel uni ipsorum vel eorum certo nuntio, qui præsentes litteras secum attulerit."

[197] *Ib., p.* 439.

[198] Maitland, *Select Pleas Manor. Cts.,* p. 152. Gross, *Select Cases, Law Merchant,* pp. 26, 59, 62, 65, 66, 70, 81, 86.

[199] Gross, *Select Cases, Law Merchant,* p. 87.

[200] Bond, *Archæologia,* Vol. 28, document CXVIII. "Coppo Josep . . . et sociis suis, mercatoribus de societate Frescobaldorum de Florentia vel eorum aut unius ipsorum certo attornato istud breve deferenti."

[201] Gross, *Select Cases, Law Merchant,* p. 65.

attorney were limited, for he could not plead in the name of his principal nor, for instance, deny a release alleged to have been made by his principal.[202] We have mentioned the great importance of the Italian and Provençal notaries in such commercial matters as loans, exchanges, charter-parties, and insurances. But the notary was never important in England, and this is a fact to confirm our opinion: "I cannot but think that if Englishmen had had much need to use the commercial instruments which these notaries drew, if these instruments had come with any frequency before the courts, we should have seen a similar class arising in England." [203] In fact, it appears that it was not until the middle of the XV Century that commercial paper was much used by the native English merchants,[204] which corresponds to the time when the foreign trade of the country began to come under their control.

The primitive state of the writings obligatory is characteristic of many of the other subjects of the early law merchant. Compurgation is extremely common, and seems to have been denied only in the case of tallies sometimes aided by two or more witnesses,[205] although by the XV Century it was not permitted to disprove a merchant's contract by compurgation, whether it was evidenced by tallies or not,[206] and the *secta* were treated more as a group of witnesses.[207] Tort and contract lacked a dividing line,[208] and the common allegation of debt sounds in detinue; [209] while there is a curious case of trespass brought for breach of contract, not against the offeror, but against an interloping third person who "ejected" the offeree from his bargain,[210] and in another case tort is brought for impeding a sale.[211] In contrast to this apparent fluidity of the action many of the cases show an insistence upon a technical accuracy in pleading quite foreign to the truly informal spirit of the law merchant.[212]

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[202] Gross, *Select Cases, Law Merchant,* p. 67.

[203] Holdsworth, *H.E.L.,* V, p. 115.

[204] Goldschmidt, pp. 458–459, citing many references to exchange and protests arising out of the commerce between London and Venice, and to be found in Rawdon Brown, *Calendar of State Papers relating to English Affairs,* preserved in Venice (Rolls Series), Vols. I and II. Also Pauli, pp. 34–35.

[205] *Select Essays, Angl. Am. Law,* III, p. 35. Maitland, *Select Pleas Manor. Cts.,* p. 133. *Munimenta Gildhallæ* (Rolls Series), I, 294.

[206] Above, p. 339, n. 141.

[207] Above, p. 339.

[208] Gross, *Select Cases, Law Merchant,* pp. 67, 102, 118.

[209] *Ib.,* pp. 1, 26, 44, 59, 62, 64, 65, 66, 70, 86, 99, 103. Maitland, *Select Pleas Manor. Cts.,* p. 152.

[210] Gross, *Select Cases, Law Merchant,* p. 97.

[211] *Ib.,* p. 17.

Leaving out of account the cases which deal with the police and with the regulation of the fair, such as forestalling,[213] selling goods outside or privately before display in the fair,[214] using false measures or light weights,[215] assaults,[216] the suppression of immorality and of unsanitary conditions,[217] the cases which are concerned with the contract of sale are more numerous than any of the others. As yet the contract had not become purely consensual, though it was tending in that direction, so that the agreement was proved by a drink,[218] or by the gift of God's penny, or the acceptance of earnest money.[219] The principle of *caveat emptor* prevailed [220] unless goods had been sold by sample and had been warranted equal to the sample,[221] or unless the quality of the goods had been expressly warranted by the vendor,[222] or unless there was an actual case of fraud.[223] There was also the question of the rights of the true owner against a possessor of his property, but the rules in England had not yet reached a definite statement, nor were they uniform.[224] It seems that, as in other matters, the tendency was to protect the purchaser in good faith, in the general interest of commerce, just as was being done on the Continent. In its earliest development, proof of purchase in good faith merely relieved the innocent third party from the possibility of punishment for theft, and the property had to be surrendered to the true owner; this was the common law in Bracton's day.[225] This rule was modified in certain places so that only the burgess and not the "foreigner" could have the benefit of it.[226] At the same time, there was a variant of the rule, which was introduced in the interests of commerce, to the effect that the owner could not recover his property from the bona fide purchaser except by refunding to him the purchase price.[227] Sometimes the purchaser had to prove purchase in the open market, and sometimes in daylight,[228] and in various ways the law does not seem to be absolutely settled. A case in 1291 shows that bona fide purchase within the fair's territory, though not in the fair itself, was a good defence to an action of theft, and that the purchaser acquired a good title to the goods; [229] but another case of 1332, while it admits the defence of purchase in good faith, speaks of permitting the owner to sue again in some other way.[230] In the late XV Century the law seems to have become more settled, as regards the special custom of the city of London, and the bona fide purchaser was protected. It was held that London by ancient privilege was entitled to hold a market every day in the week, and that all the shops there were a market overt for sales made by the shopkeepers.[231]

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[212] Gross, *Select Cases, Law Merchant,* pp. 17, 20, 44–45, 57, 65, 67, 85.

[213] *Ib.,* pp. 48, 83, 92, 93.

[214] *Ib.,* pp. 2, 6, 21, 56, 58, 78, 93.

[215] *Ib.,* pp. 19, 40, 62, 74.

[216] *Ib.,* pp. 7, 13, 17–18, 20, 29, 30, 33, 61, 72.

[217] *Ib.,* pp. xxxv, 11, 14, 16, 18, 41, 48, 74, 75, 84, 106, 107.

[218] *Ib.,* pp. 47, 52. Maitland, *Select Pleas Manor. Cts.,* p. 139, n. 1.

[219] Gross, *Select Cases, Law Merchant,* pp. 39, 40, 47, 50, 52, 79, 88, 103 where both are given. Maitland, *Select Pleas Manor. Cts.,* pp. 150, 151. Bateson, II, pp. lxxxii–lxxxiii.

[220] Bateson, II, pp. lxxxiii, 183.

[221] Gross, *Select Cases, Law Merchant,* pp. 91, 102, 105–106. In the latter case, it is left to the inquest as to whether the goods are equal to the sample.

[222] *Ib.,* p. 60. Bateson, II, pp. lxxxiii, 182–183.

[223] Gross, *Select Cases, Law Merchant,* pp. 50, 62. Bateson, II, p. 82, where goods are "good above and worse below" the vendor must make amends.

[224] Above, pp. 204–206. Bateson, II, p. lxxvi.

[225] Bateson, II, p. lxxvi.

At this earlier period the English law merchant had adopted national reprisal proceedings against persons from other English cities not very unlike the international code of reprisals. There was one important difference, that in national reprisals the procedure merely involved distraint of the goods of the debtor's fellow-citizen, and not their actual expropriation.[232] For the purpose of reprisals it is plain that the communities of merchants from any given place were thought of in the same solidary sense that they were on the Continent.[233] Whether this idea was based upon a concept of municipal solidarity or of gild solidarity does not seem to us to matter very much, since for practical purposes they were frequently almost coterminous. Professor Maitland, whose opinions must ever be received with the greatest respect, seems to have thought that reprisals were based on the idea of a subsidiary liability, through guarantee, of any member of a gild for the debts of any other, rather than on the idea of a communal solidarity,[234] but to us this seems to be an over-refinement, based upon the careful legal analysis of an age in which legal forms are more advanced and more exact. To us it seems to be only a practical, rough-and-ready means of compelling payment, with perhaps a rudimentary concept of indemnity over. Fleta speaks of a "foreigner" distrained in reprisal "as of one society or city" with the principal debtor, which seems to show that it was not entirely a gild matter,[235] and Miss Bateson gives the pith of it when she writes, "the fellowship was not required to be a gild fellowship, for the object was to bring pressure to bear upon the court of the debtor through one of his fellow-justiciables. The sufferer of distraint was intended to make known his distraint in his own court and require his court to send the debtor to pay his debt and release the distress." [236] Because of this situation boroughs sometimes made special laws to compel a debtor to reimburse damages caused a fellow-citizen by his non-payment,[237] and many attempts were made both to prevent a citizen from subjecting his fellow-citizens to the dangers of reprisals [238] and also even to prevent the giving of credit to foreigners, which might involve the borough in difficulties in its endeavor to collect the debt.[239] Some communities even went further and made a debt owed to a foreigner a joint charge on themselves, rather than face the possible consequences of its non-payment.[240] But, just as on the Continent, it was seen in England that reprisals had a very damaging effect on trade, and so the matter was regulated at first,[241] and, finally, many borough charters were granted which forbade it,[242] so that when the Statute of Westminster [243] abolished it nationally in 1275 it was only a recognition of a situation already existing to a considerable extent. The Statute did not touch aliens,[244] and, although as regards them the right was also done away with, in 1351 and 1353 it was restored again, and the country had to learn its lesson all over again upon a national basis, as we have shown in our previous chapter.[245] There are a number of references to reprisals by distraint to be found in the earlier records of the fair court of St. Ives; [246] one even meets with genuine international reprisals.[247] There are also special royal privileges which anticipate the legislation of 1351–1353 and provide that the merchants of a given foreign community shall not be distrained for any debt unless they are sureties or principal debtors.[248]

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[226] Bateson, II, pp. lxxvi–lxxvii.

[227] *Ib.*, II, pp. lxxvii–lxxviii.

[228] *Ib.*, II, p. lxxviii.

[229] Gross, *Select Cases, Law Merchant*, pp. 48–49.

[230] *Ib.*, pp. 110–111. The court decided that the owner could not proceed by seizing the horse from the hands of the possessor, but "ideo dictum est ei quod sequatur in alia forma si sibi viderit expedire."

[231] *Y. B. B.* 9 Hen. VI Mich. pl. 28. p. 45; 33 Hen. VI. Hil. pl. 15; 35 Hen. VI Mich. pl. 33, pp. 28–29; 12 Edw. IV. Pasch. pl. 22, claiming "La Cite de Londres est auncien City de temps d'ont memory etc. et ad estre un market chescun jour en le semaigne pour touts hommes de vendre."

[232] Bateson, II, p. lii.

[233] Maitland, *Select Pleas Manor. Cts.*, p. 134. Above, p. 226.

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[234] Maitland, *Select Pleas Manor. Cts.*, p. 135. "The notion that the traders of a borough form a society every member of which is more or less answerable for the acts and defaults in the way of trade of every other member is however brought out by a clause found in some of the earliest charters . . . But on these mercantile rolls the prevailing idea is rather that of guarantee of subsidiary liability, than that of corporate unity; the debt is the debt of an individual, but his peers and partners guarantee it . . . As has been well said, there is something analogous to international relations in the intermunicipal relations of the middle ages."

[235] Fleta, II, c. 63. Bateson, I, pp. 119–120.

[236] Bateson, II, p. liii.

[237] *Ib.*, II, p. liv; I, 116–117.

[238] *Ib.*, II, pp. lvi.

[239] *Ib.*, II, p. lvii; I, p. 209.

[240] *Ib.*, I, pp. 126–127.

[241] *Ib.*, II, p. lv.

After the middle of the XIV Century the English fairs, and with them their courts, began to decline, partly owing to the growth of the trade of the staple towns [249] and to the tendency of commerce to become fixed in definite municipal centers, just as on the Continent. There was even a tendency for the law merchant to become absorbed in the common law. In 1293 some of the judges seemed to wish to give effect to the mercantile custom of proving debts by tally; [250] in 1303 the Carta Mercatoria legally established the custom that the giving of the earnest money made the bargain binding; [251] in 1275, 1351, and 1353 statutes did away with the law of reprisals, as we have seen,[252] while common law decisions began to recognize the principles of purchase in market overt in London.[253] Already in the XIV Century the author of the treatise on the law merchant in the *Little Red Book of Bristol* regards it as the creature of the common law,[254] to which, as we have seen, the merchants could withdraw their suits,[255] and he can only name three specific differences between them.[256] "The documentary material regarding the activity of piepowder or fair courts . . . increases in range, though not in richness, during the fourteenth and fifteenth centuries," [257] and although these courts continued to be held in some numbers into the XVII Century,[258] they had become even more local than they originally were.

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[242] Bateson, II, p. liv.

[243] Stat. of Westminster. I, c. 23.

[244] Maitland, *Select Pleas Manor. Cts.*, p. 135.

[245] Above, pp. 317–319.

[246] Gross, *Select Cases, Law Merchant*, p. 1, n. 1; pp. 2, 3, 4, 5, 6, 7, 8, all of 1270. Maitland, *Select Pleas Manor. Cts.*, pp. 145–147, 155, 157, 158, n. 1, 159, all of 1275.

[247] Gross, *Select Cases, Law Merchant*, pp. 9–10.

[248] *Ib.*, pp. 9–10.

[249] *Ib.*, p. xvii.

[250] *Y. B.* 21, 22 Edw. I (Rolls Series), 456, 458.

[251] Above, p. 351.

[252] Above, pp. 317–319.

[253] Above, p. 352.

[254] Bickley, I, p. 68. "Lex communis quæ est mater legis mercatoriæ et quæ suam filiam in certis privilegiis et in certis locis dotavit."

Their decline in importance dates from the second half of the XV Century, when statutes and decisions curtailed their usefulness. In 1466 and in 1467 two decisions in the Common Pleas struck at the very heart of these courts, which, as our study of them both on the Continent and in England has shown, lay in the power of the merchants themselves to influence the decisions and establish the laws there administered. These two decisions held that the steward, or other person holding the court, was its true judge, and not the suitors.[259] A statute of 1477 still further cut away the utility of the court by narrowing its jurisdiction to cases which arose within the bounds of the market or fair, and which occurred during the time that the fair was permitted to be held.[260] It is not surprising, therefore, that these courts decayed. Nevertheless, the law merchant did not vanish. In the XIV Century it transferred itself to the Courts of the Staple, which we shall soon examine, and for a long time it continued to govern the foreign trade of the country.[261] At the very end of the XV Century and during the XVI Century it received many doctrines from the Continental law merchant, and the absorption of this larger body of the law merchant by the common law did not really begin until the XVI Century. And since the law merchant concerned itself with foreign trade hereafter, we must now begin an examination of the foreign commercial relations of the nation. We shall speak first of all of those with Italy, next of those with the Hanseatics, third of those with the Low

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[255] Above p. 337, n. 113. "Et recusare legem mercatoriam bene possunt et ita faciunt communius quam aliter per totum regnum."

[256] Bickley, I, p. 58. "Lex mercati differt a communi legi tribus modis; in genere primo quod celerius deliberat se ipsam. Secundo quod qui plegiat aliquem ad respondendum . . . plegiat totum debitum, dampna et expensas querentis . . . Et tercio . . . in eo quod non admittit aliquem ad legem in parte negativa, sed semper in ista lege querentis est probare."

[257] Gross, *Select Cases, Law Merchant,* p. xvii.

[258] *Ib.,* pp. xviii–xix.

[259] *Y. B. B.* 6 Edw. IV. Mich. pl. 9: 7 Edw. IV. Hil. pl. 27, p. 23.

[260] Stat. 17 Edw. IV. c. 2, slightly amended by 1 Rich. III. c. 6.

[261] Holdsworth, *H.E.L.,* I, p. 569.

Countries, and finally of various others, carrying them down to about 1353, the date of the Statute of the Staple.

By the end of the XI Century the Italians had begun to settle in England, and there is mention of a rich Florentine, Otto degli Gherardini, whose modern descendants are known as Fitzgerald.[262] By 1156 we are told that the foreign trade of England was almost entirely conducted by foreign merchants, centering their operations at the fairs; [263] and no doubt a large proportion of these merchants would have been Italian. But in the earliest records that we have, the importance of the Italian merchants for England does not seem to have consisted so much in the ordinary commercial operations of export and import as in their financial dealings with the kings, as a consequence of which their trade relations grew rapidly. As early as 1181 we find Bolognese merchants engaged in the money business in England, and there is mention of other merchants in 1199,[264] in which year, we remember, King John promised to repay some merchants of Piacenza money which they had advanced to English ambassadors travelling to Rome in the time of Richard I.[265] The letters of credit given above [266] show at what an early period the Italian merchants had assumed the character of bankers and of money-lenders in England. Now at this time there was a considerable political connection of England and of the English kings with the Papal court, and advocates, messengers, and ambassadors came and went, as the letters of credit prove to us. At an earlier period the Jews had monopolized the money business of England and had often acted for the King in his transactions,[267] but the close relations of the English Church with Rome and the fact that the Italian merchants were its agents throughout Western Europe came to bring about a change in the Jewish financial supremacy.

> "The Pope's authority was almost paramount in this kingdom during the reigns of John and Henry III. And to this period . . . may be attributed the commencement of that system of money-transactions which the Italians exercised in England with enormous profit, but which at length brought ruin upon them in the middle of the reign of Edward III. The merchants whom his Holiness thus employed

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[262] Goldschmidt, p. 186. Schanz, I, p. 112.
[263] Walford, p. 21.
[264] Goldschmidt, p. 186.
[265] Above, p. 348.
[266] Above, pp. 347–349.
[267] Bond, *British Archæologia,* Vol. 28, 1840, p. 213.

> as his agents in England, were citizens of Sienna, Lucca and Florence, and principally of Sienna. They generally were members of established companies, trading in common. But, in the instances where I have found them mentioned, the names of the principals of the firms are not always very clearly distinguished . . .[268] In an early year of Edward I there is notice of four companies of merchants of Sienna, at that time acting here under the title of 'Campsores Papæ'; but the names of the companies are not expressed. Other companies probably were at the same time employed by the Pope in this country, in a similar capacity. And we shall hardly wonder that his agents were so numerous, when we consider the largeness of the revenues that were to be collected. In addition to the annual census and the first fruits the profits of a tenth or the moiety of a tenth of ecclesiastical property were to be remitted almost yearly. From the reign of John down to about the eighth year [1334] of Edward III the clergy were perpetually subject to these impositions . . . There was continued occupation therefore for the bankers who were sent to gather in the Papal revenue." [269]

Moreover, they were brought into contact with the various great religious houses to which they often loaned money to satisfy the exactions of their feudal superiors, or of the Pope, and his name saved them from persecution for their usurious practices. As we shall see, the Pope sometimes intervened with the King in order to protect them.[270]

With the collection of the Papal revenues and with their general money-lending business the astute Italians were prompt to see the advantages of trade, and they seem to have connected the two at a very early period in a most profitable fashion. In the XIII Century one of the Gherardi of Florence was engaged extensively in dealing in wool.[271] Many Italians swarmed in from other cities and Venetians are mentioned in English documents as early as 1201.[272] The Genoese had arrived a little earlier and had established good relationships from the time of Richard.[273] Later commerce was conducted with Italy by sea and quite directly, but at this time it mostly went by land, through France and through Flanders.[274] By the middle of the XIII Century there were many Italians in Eng-

[268] But see Goldschmidt, p. 186. "Angelus Solaficus et Socii" from Siena in 1233; Raynaldus and others in 1255 from the same place.

[269] Bond, pp. 213–215.

[270] Below, p. 361.

[271] Schanz, I, p. 112.

[272] *Ib.*, pp. 117–118.

[273] *Ib.*, p. 114.

[274] *Ib.*, p. 118.

land, and already the complaint was made that they were sucking money from the church.[275] We now hear of such famous Florentine firms as the Bardi, the Peruzzi, and the Frescobaldi. In the earlier part of the reign of Henry III few loans appear to have been made the King by the Italians, perhaps because he was supporting his brother-in-law, Frédéric II, in his quarrel with the Lombards, but later on loans were made.[276] The Italians also utilized to the full their relations with the great, wealthy, land-owning, religious houses of England and entered into contracts with them to buy up all their wool each year; all this at the same time that they were making large loans and engaging in much other commerce. Bond's account of this phase of the Italians' commerce can hardly be much compressed without loss, and so we reproduce it: [277]

> "Before the close of the reign of Henry III the Italians had gained a firm footing in England, not merely as the Pope's servants but as merchants and money-lenders. The commercial state of the country at that period offered many advantages to traders who, like the Italians, were in communication with agents and partners in all parts of the world, and had large capital at command. . . . Rolls of the collection of subsidies, remaining in the Exchequer, shew how insignificant a portion of the public taxes was paid by the class of merchants and burgesses. . . . The produce of each district was exchanged by actual barter among the inhabitants, at the periodical fairs in the neighbourhood. What foreign commodities were in use, were bought at the large fairs of Boston, Winchester, and Bristol; and only partially dispersed through the kingdom by travelling merchants little above the rank of modern pedlars. The commercial wealth of the country was collected in a few towns and cities, such as London, Bristol, Winchester, Lincoln, Boston, York, and Hull; and the difficulties and dangers of carriage confined the advantages of their prosperity to the immediate vicinity . . . [The Italians] spread themselves over the country; they filled the fair of Boston and others with foreign goods of their own importation; and their superior opportunities of disposing of wool, enabled them to bid high for that commodity of which a large proportion passed through their hands. Some estimate of the extent to which they carried this branch of their traffic may be formed from the contents of a bundle of documents which I have seen amongst the Queen's Remembrancer's Records, consisting of returns, from ten different companies of Italian merchants in England, of the quantity of wool in their possession on a certain day in [1294]. The King was then at war with France; and he had issued commands for the arrest of all wool, wool-fells, and

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[275] Schanz, I, p. 112.

[276] Bond, p. 236.

[277] *Ib.*, pp. 219–222.

> hides, in whosoever hands they might be found. They were to be retained in the custody of the King's officers, in order to prevent the possibility of their being exported into the dominions of the French King. The returns alluded to are made by the Italians themselves. The companies are distinguished by the following names: 'La compaignie de sire Barde Frescobald de Florenze, Neire.' 'La compaignie del Circle Blanc.' 'La compaignie du Circle Neyr de Florenze.' 'La compaignie de Barde de Florenze.' 'Societas Ricardorum de Lucca.' 'La compaignie de Pouche de Florenze.' 'La compaignie de sire Jon de Friscobald de Florence, Blaunk.' 'La compaignie de Mozze de Florenze.' 'La compaignie de Spine de Florenze.' 'La compaignie de Bestre de Louck' [Lucca]. The total number of sacks of wool which they acknowledge to have in their possession, is [2380]. By far the greater part is stated to have been bought of religious houses: indeed many of the companies return as having received only from them. The original documents contain statements of the conditions and circumstances of the purchases; by which it appears that many of the religious houses were under engagements to deliver all their wool, of one or more year's growth, to some one of the companies, at a price previously stipulated. The Abbey of Waverley, for instance, was bound to deliver all its wool to the Frescobaldi Neri of Florence, at Kingston-upon-Thames, on the feast of St. John, and they were to receive twenty marks for every sack of good wool, and fifteen marks for each sack of middle value . . . It is probable therefore that their capital, in this single branch of traffic in England, was not less than £30,000."

At the same time, the Italians also had very considerable commitments in loans to private individuals. These are shown in the Memoranda Rolls under the title *Recognitiones,* and Bond writes that there are numerous entries to be found, both from individuals and from religious houses.[278]

With the accession of Edward I the Italians began to assume a considerable position in the scheme of English finance,[279] which, at this period, was very defective, in that there was no established method of borrowing upon credit for the use of the government.[280] In the earlier time of Henry III the revenue had not been sufficient to meet the expenses of the government and of the royal household, so that that ruler had had to borrow from the Italians, and this condition continued under Edward I's reign and was aggravated by his frequent and protracted wars.[281] Even before he came to the throne Edward had had dealings with the Italian bankers, for when he was in the

[278] Bond, p. 222.
[279] *Ib.*, p. 240.
[280] *Ib.*, p. 223.
[281] *Ib.*, p. 224.

Holy Land the merchants of Lucca had remitted large sums to him from England,[282] and so when he came to the throne and found no English merchants sufficiently wealthy to advance the money that he needed [283] he naturally turned to the Italians. They were intelligent and enterprising and suggested schemes for increasing the revenue, besides the help that they gave him by their loans. For those days the transactions were very large.

When Edward II came to the throne he paid no less than £118,000 of his father's debts, of which £56,500 went to the Frescobaldi alone,[284] and he adopted a policy of retrenchment and borrowed comparatively little. The assignment of the revenues of the customs had aroused much opposition, and the fourth article of the Statutes of the Barons prohibited it in 1311 from thenceforth.[285]

Meanwhile, a direct commerce with Italy had been growing up at the beginning of the XIV Century, because of the quarrel between the French and the Flemings in 1315–1316, as a result of which the Flemings left the fairs of Champagne, and the Italians were impelled to use the direct sea route to Flanders and to England.[286] A regular trade with Venice began in 1319 [287] and in 1316 there is mention of a Genoese convoy,[288] while a few years previously merchants are mentioned from Perugia, Lucca, Lombardy, Tuscany, Genoa, and Florence.[289] Many privileges were granted to the Italians, as the St. Ives records show us, especially that they should not be distrained for any debt unless they were principals or sureties, and they were freed from many restrictions imposed by the towns.[290] The records of piracies and spoils which we have given above [291] show how considerable the direct commerce from Italy had become; they show, too, how Edward III saw to it that his creditors got prompt justice, and how he felt it necessary to settle their claims. Hard-pressed for money as he was, it is plain that he did not wish to pay cash out of his treasury, and so he sometimes settled the claim by exempting the wool exports from taxes until the exemption had equalled the claim.[292] In exchange for the services of the Italians, also, the King would intervene in their behalf in other countries, to protect them or to intercede for them;[293] just as the Pope sometimes did for them in England.[294] Many offices were held by the Italians both in the Church[295] and in the State, especially in the customs; the mint was often under their direction, and most of its workers came from Italy.[296] The Italians also acted abroad as the King's agents, and even as his ambassadors, sometimes in important affairs. This was especially true of the Genoese merchants in the time of Edward III.[297]

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[282] Bond, pp. 240–241.
[283] *Ib.*, p. 224.
[284] *Ib.*, pp. 246–249.
[285] Stat. 5 Edw. II. c. 4.
[286] Schanz, I, pp. 118–119.
[287] Peschel, p. 44, n. 2.
[288] Rymer, *Fœdera,* III, pp. 564–565.
[289] *Munimenta Gildhallæ,* I, pp. 539–541.
[290] Rymer, *Fœdera,* II, p. 747. Bond, pp. 231–232. Schanz, I, p. 120.
[291] Above, p. 285, n. 126.

The records of these transactions prove to us inferentially a number of interesting things: the wealth of the Italians, the ramification of their commercial and financial interests, their employ in matters of customs and finance by the government, the connection of the export of wool with that finance, and the knowledge that some native royal officials, at least, must have acquired of the Italian developments in the use of commercial paper for remittance. Similarly in the matter of loans the Italians had developed the transactions well beyond the primitive ideas of the Church.

In private loans they had adopted several ingenious expedients to get around the prohibition of the Church as to usury. One of the simplest was to discount the sum advanced, a method used as early as 1277.[298] A good profit could always be made by stipulating for repayment in goods at a fixed and artificial price, and this system was probably in use with regard to the wool of the religious houses.[299] Another method was to make the loan gratuitous for a given period, and thereafter to stipulate for an arbitrary sum in the nature of fixed damages, or for interest at an agreed rate, or for both.[300] Finally, the debtor pledged all his property as security.[301]

In the case of royal loans interest was rarely promised, but a premium was usually given, sometimes definitely stipulated for in the obligation and sometimes apparently as the result of a parole agreement,[302] in consideration of the losses and expenses caused the merchants by a delay in the royal repayment.

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[292] Above, p. 287. *Select Cases King's Council* (Selden Soc.), p. lxxii.

[293] Rymer, *Fœdera,* II, pp. 123, 124, 159, 347, 403, 420, 424, 456, 470, 503.

[294] Rymer, *Fœdera,* I, pp. 905, 935. Bond, pp. 215–216.

[295] Above, p. 358.

[296] Bond, p. 233, citing many authorities.

[297] *Ib.,* p. 234.

[298] *Ib.,* p. 226.

[299] *Ib.,* p. 226.

[300] *Ib.,* pp. 226–227.

[301] *Ib.,* pp. 222–223.

It will thus be seen that the Italians were a very important factor in the mediæval commercial life of England, but we must now leave them and turn to the Hanseatics, who were also very important at that time.

The word "Hansa" seems to have been the invention of the English,[303] and although it has come to be applied to the Germans the usage is not quite correct, for there were other Hansas,[304] and the earlier usage spoke more correctly of the German Hansa. It appears originally to have been synonymous with "gild," for the *hanse-hus* of the North of England was the *Gildhall* of the South.[305] We have seen that commercial relations existed with Germany and the Rhine cities before the Conquest,[306] and thus well before the creation of the Hanseatic League or of most of the municipalities, but the earliest traces of an association of Germans in England does not go back before Henry II.[307] Apparently the first concession was that of a house in London to the wine merchants of Cologne. In 1176 the Lübeckers were freed from the right of shipwreck, and a few years later King Richard renounced the royalty paid to him by the Cologne merchants for their gildhall.[308] These and other rights and exemptions were confirmed by King John in 1205 and 1210, and in 1235 by Henry III, who gave special permissions to the merchants of Cologne to attend fairs in all parts of England.[309] In 1230 the same king admitted the Brunswickers to trade freely in England, and he also freed the merchants of Gothland from all sorts of restrictions concerning English goods going to Wisby, or goods coming from there to England.[310]

At this time the head of the Hansa was the city of Cologne, but in the course of the XIII Century the new Baltic city of Lübeck, supported by the Emperor, arose to challenge that supremacy successfully, closely followed by Hamburg. In 1238 Henry III granted the Lübeckers commercial liberties and the privilege of trading in England; in 1266 he granted them many privileges; and in 1267 they were authorized to form a Hansa in England after the model of that of Cologne, the king reserving only the old established rights of customs.[311] In 1266 a similar privilege had been granted to Hamburg, and the two cities united to form the principal Hansa, most of the other German cities leaving that of Cologne and joining them,[312] so that by the end of the XIII Century the new group was known in England as the German Hansa.[313] The Germans already established in London aided those who had just come over, and eventually there was formed a gildhall of the Germans at London, known as the Steelyard or Stahlhof, which, before the end of the XIII Century, had general privileges conferred on it by royal grant.[314] The Hansa also possessed special privileges of one sort or another in Canterbury, Rochester, Ipswich, Yarmouth, Norwich, Lynn, Boston, Grimsby, Hull, and York.[315]

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[302] Bond, pp. 228–229.

[303] Worms, p. 107. "L'Angleterre semble avoir la première employé et vulgarisé la désignation de Hanse allemande, ayant toujours attaché à ce mot le sens d'association, de communauté."

[304] Paris, Flanders, and England; Goldschmidt, p. 115, n. 67.

[305] Stubbs, p. 131.

[306] Above, p. 328.

[307] Worms, p. 105.

[308] *Ib.*, p. 105.

[309] Walford, p. 23.

[310] Worms, p. 105.

For instance, as a result of the conflict between citizens and foreigners, the city of Lynn granted, in 1310, a charter confirming all the ancient privileges of the Hanseatics, among them the right, in commercial litigation, to be tried before a court composed of two burgesses chosen by the mayor of Lynn and two Hanseatic merchants designated by the alderman of the German Hansa.[316] Less antagonism was felt by the English for the Hanseatics than for the Italians, since they were much more the same sort of people; and since the Hanseatic cities possessed a unity which the Italian cities did not they were able to preserve their privileges much longer.[317] Moreover, some of their commerce was more in accord with the faulty economic ideas of the day; the Italians were thought of as making the country poor by taking money out of it, while the unknown author of the early XVI Century documents printed in Pauli [318] commends the trade with the Easterlings of Prussia because they brought bullion into the realm to settle their unfavorable balance of trade. Like the foreign incorporation of a modern undertaking the German Hansa in England was theoretically independent of the cities in Germany and must not, therefore, be legally confounded with the Hanseatic League. It treated on its own proper account with the English authorities, secured favorable conditions, further consolidated them by successive ratifications, and maintained itself without special attack until the middle of the XIV Century.[319]

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[311] Schanz, I, p. 173.

[312] Morel, p. 123.

[313] Schanz, I, p. 174.

[314] Worms, p. 106.

[315] Morel, p. 123.

[316] Worms, p. 121.

[317] Schanz, I, pp. 172–173.

[318] Pauli, p. 72, "better to have plentie of gold and silver in the realm than plentie of merchauntes and merchandizes"; p. 77, "Esterlings of Spruce and of other parties in the Est contrey hath been profitable merchauntes for the realme in olde tyme, before they toke Coloners [Cologners] into their Haunce";

Justice was done to the members of the Hansa either by their aldermen or by their own national tribunals.[320] In 1282 they had been granted the right to choose an alderman, but he had to be selected from among the various aldermen of the city of London, and he had to take an oath before them and before the mayor to do justice and not to infringe the laws of the city. He was by no means the real head of the Germans in London, nor was he qualified to administer their affairs; it was, instead, a position of influence, honor, and some profit, and the incumbent was supposed to act exactly like the Continental *consul hospes,*[321] and to be a protector, adviser, and guardian of the interests of those whose titular head he was.[322] Beside him there was chosen the real head, a second alderman, who had to be a Hanseatic citizen.[323] Of the precise administration at that time we cannot tell, but it seems probable that in its general characteristics it was like the consulates in use elsewhere all over the Continent. We do know that the usage had already grown up that the Hanseatic alderman should judge not only the disputes in which Germans were the sole parties, but also those between Germans on one side and Englishmen on the other.[324] These privileges were confirmed by Edward I in 1290.[325]

In 1303 the Carta Mercatoria was granted to the foreign merchants from Germany, France, Spain, Portugal, Navarre, Lombardy, Tuscany, Provence, Catalonia, Flanders, Brabant, and the Anglo-French dependencies, as the result of a bargain with the king by

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p. 36, "And what [the Easterlings] hadd nede of more wollen clothe than England hadd nede of ther comodites, therfor they wer wont to bryng gold and silver uncoyned, whereof the name of sterlyng silver rose."

[319] Worms, p. 107.

[320] *Ib.*, p. 106.

[321] Above, p. 152.

[322] Barthold, pt. II, p. 17.

[323] Worms, pp. 106–107.

[324] Barthold, pt. II, p. 17.

[325] Worms, p. 105.

which they paid new customs dues in addition to the old ones.[326] The Charter interests us most at this place, however, since the Hanseatics were able to convert to their own sole advantage this which was originally a general grant, and they secured successive confirmations and even extensions of it, which other foreigners were not able to do.[327] The privileges were very considerable: the merchants were exempted from certain municipal dues; they were at liberty to trade wholesale not only with natives but with other foreigners and they were permitted to sell mercery and spices retail; they were permitted to re-export merchandise which they had brought into the kingdom and to export that which they had bought; they were permitted to reside wherever they chose; all contracts between merchants and any other persons were to be binding when the God's penny had been paid, and in case of a dispute such contracts were to be proved according to the customs of the place where they were made; their merchandise was not to be seized in the King's name; speedy justice was to be done them in the local courts according to the law merchant, and in case of any failure the local official was to be punished and the merchant indemnified; in all trials, save those involving the death penalty, the merchant was to have half the jury composed of foreign merchants, if enough were available; merchandise was to be weighed by the King's scales and there was to be one weight and one measure throughout the kingdom; if the Hanseatics were not granted swift justice in London a special judge would be appointed; no future grant of privileges would be made to anyone else so as to infringe the present charter. But even these very considerable privileges were enlarged following their confirmation by Edward II in 1311. In 1316 the Hanseatics were permitted to act as brokers, and in 1317 they were freed from the danger of reprisals by a declaration that only the principal debtor and his sureties should be liable.[328] The King further forbade the English towns to encroach upon the privileges of the Hanseatics by municipal ordinances. Beyond the special confirmation of the Carta Mercatoria to them alone [329] they received still more privileges in regard to their disputes. They were to elect their own aldermen, who were to judge them by their native laws; but if the case concerned Englishmen, too, it was not to be tried in the Admiralty, but either before two royal judges or before the mixed jury, and, in the phrases that we have seen in general use on the Continent, the procedure was to be *levato velo ac sine strepitu et figura judicii citius et compendiosius quo fieri poterit,*[330] while a later statute permitted an appeal to the capital of the League at Lübeck.[331] Another method of trial was in use, as at Lynn, before four merchants, two being Hanseatics chosen by the alderman, and two being Englishmen chosen by the mayor; they were charged to determine the case according to the law of the place where the legal relationship arose.[332] The alderman at London was the head of the entire English organization; he advised and governed the smaller groups elsewhere and settled any differences which arose among them.[333] In 1335 Parliament admitted foreigners as well as citizens to both the wholesale and the retail trade,[334] and in 1338 the rights and privileges of the Hanseatics were confirmed by Edward III.[335] Just as was the custom on the Continent the Hanseatics were forbidden by their home authorities to go to law before the English courts, or to procure the arrest of a fellow-member of the League unless they had previously secured the permission of their own authorities.[336]

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[326] Given in *Munimenta Gildhallæ* (Rolls Series), II, pt. I, pp. 205–211.

[327] Worms, p. 114. Schanz, I, p. 174.

[328] Schanz, I, p. 175.

[329] *Ib.*, p. 174.

The trade with the Low Countries was also very important for England and the English merchants, because the strength of their active business lay in that commerce;[337] and it was there that the expanding English trade won its first permanent victories in its march towards a world commerce. From an early period the business relations between England and the Low Countries were comparatively lively[338] because the latter lay at the end of the great trade route from the Mediterranean[339] and the Italians used it as the channel of their English commerce.[340] The Low Countries had developed commercially at a period somewhat earlier than England, starting from the XI Century, and in their industrial development had attained a great supremacy. In the XIII Century they were rich in flourishing cities, thickly populated, full of merchandise, and in the possession of an imposing world market,[341] so that the Italian cities were the only ones that could compare with them. We have seen that from the earliest times the merchants had to obtain personal licenses to visit England,[342] but it later became customary to purchase these licenses collectively, sometimes by entire cities, and sometimes by even larger divisions. In 1199 and in 1208 we find Flemish cities making such an arrangement with King John,[343] and in 1237 the counties of Flanders and of Hainault paid Henry III 400 marks for the first general license to trade with England. Various individuals and cities extended their privileges at this period [344] and the Flemish Hansa, which settled in London, was especially energetic, while reciprocal privileges were granted to the English in the Low Countries at an early period and thus the legal basis for mutual commerce was established in the XIII and XIV Centuries.[345] It is important to note that this found expression in a treaty, for in this respect mediæval England was very isolated, and, furthermore, reciprocal provisions were not common in the Middle Ages. It was then customary for a ruler to make a unilateral grant of privileges to the merchants of another country, and the most that it was usual to stipulate for was for freedom of commerce on either side, which meant, in practice, simply the right for a foreign merchant to visit a country without first obtaining a license. A considerable number of privileges were also understood to be included as a general international custom [346] and the towns themselves could also make further grants within their own boundaries as they saw fit.[347] The extent of the trade relations with Flanders is shown by the numerous cases of spoil that arose in the early XIV Century, and which have been set forth above.[348] Flanders was the greatest market for English wool and it even drew wool from the more distant Spain, manufacturing this into cloth which was in use all over Europe. The close commercial connections of the two countries also found their reflection in the close connections of the reigning houses at this period, and the close dependence of the manufacturing country upon the country producing the raw material was thoroughly understood by the author of *The Libell of Englishe Policye* in 1436.

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[330] Silberschmidt, p. 18.
[331] Morel, p. 125. Silberschmidt, p. 19.
[332] Worms, p. 121. Morel, pp. 124–125.
[333] Worms, p. 115.
[334] *Ib.*, p. 114.
[335] *Ib.*, p. 105.
[336] *Ib.*, p. 240.
[337] Schanz, I, p. 327.
[338] *Ib.*, p. 3.
[339] Above, p. 156.
[340] Above, p. 357.

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[341] Schanz, I, pp. 3–4.

[342] Above, p. 328.

[343] Schanz, I, p. 6, n. 2.

[344] Gross, *Select Cases, Law Merchant*, pp. 9–10.

[345] Schanz, I, p. 6.

[346] *Ib.*, I, pp. 6–7.

[347] Above, p. 363. *Munimenta Gildhallæ* (Rolls Series), II, pp. 61–66.

[348] Above, pp. 285–286.

The beginnings of a regular trade between England and the Peninsula seem to date from the early XIII Century, the initiative coming from the more developed country, for the definite references that we have at the beginning of the XIV Century indicate a commerce established for a considerable time. The merchants of Barcelona had their own banks in London and in 1303 Catalonians were appointed as arbitrators. In the same year and in 1328 they were mentioned in charters granted to the foreigners and in 1324 and 1333 indemnity was paid them because of a robbery at sea by Englishmen.[349] They were established in a number of the English ports and they also were very largely interested in the export of wool.[350] Besides Catalonia and Aragon, Castile was also endeavoring to share in the English commerce, and at the request of Queen Eleanor, the wife of Edward I, the country was opened to the *mercatores regis Hispaniæ,* the Castilians, in 1267.[351] In 1351 a reciprocal treaty was made, to last for twenty years, by which merchants were to be protected, commerce was to be free in goods of every sort, offenders were to be swiftly punished, and the fisheries were to be unhindered.[352] In 1274 Portuguese merchants are mentioned as being on a journey to England, and about the same time English merchants went to Lisbon.[353] Soon statutes and treaties made the relations closer,[354] and the trade relations, once begun, were not interrupted.[355] The citizens of London do not seem to have been especially hostile to the Portuguese,[356] and in 1308 the King speaks of an old friendship as already existing among the merchants,[357] while *The Libell of Englishe Policye* also speaks of the Portuguese in a friendly way. The first reciprocal treaty of commerce was made in 1353, to last for fifty years, but as regards Portugal it applied only to the cities of Lisbon and of Oporto, and its provisions were mostly general. The property of merchants was to be protected from seizure by the towns and their ships from capture at sea. Single infractions of the provisions of the treaty were not to render it void.[358]

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[349] *Select Pleas Ct. Adm.,* I, pp. xxiv–xxvii.

[350] Schanz, I, pp. 268–269.

[351] *Ib.,* p. 269.

[352] Rymer, *Fœdera,* V, p. 717.

[353] Schanz, I, p. 283.

[354] *Ib.,* p. 284.

[355] Rymer, *Fœdera,* II, pp. 627, 691.

[356] *Munimenta Gildhallæ* (Rolls Series), I, pp. 540–541, 628, 720.

[357] Rymer, *Fœdera,* III, p. 107.

Commercial relations with France also began at a very early period,[359] but they were not considerable until the XIII Century. The cities of the Northeast of France were the most important and had close connections with England.[360] They were in every way like those of the Low Countries, and behind them were the fairs of Champagne which, like the fairs of Flanders,[361] were attended by the English[362] and in which cloth and woolens were among the most important merchandise sold.[363] These cities were united to those of Flanders to form the Flemish Hansa of London, and many of them enjoyed special rights and privileges, concerning which we know but little, although the privileges of Amiens, Corby, and Nesle may be among the oldest.[364] But the French cities were not able to retain the leading position which they enjoyed in England at the end of the XIII Century. As we have seen, the fairs of Champagne declined,[365] the range of commerce became much wider, and, for political reasons, the Flemish cities in the Flemish Hansa seceded from the French.[366] With the South of France there was also trade at this period. King John encouraged the merchants of Poitou, Gascony, and Périgord to come to England and granted them special facilities, and his example was followed by Henry III and by the three Edwards,[367] who, quite apart from the general encouragement that they gave to the foreign merchants, wished to unite those of Gascony and Guienne to the throne by friendly and liberal treatment. Besides these merchants those of Languedoc, especially the burghers of Montpellier and of Narbonne, had direct commercial relations with England and even offices in London.[368] The merchants of Languedoc usually traded through Bordeaux, and Bordeaux itself had a wine trade with England, 141 vessels carrying 13,429 tons of wine to London in 1350.[369] In spite of the opposition of the burghers of London these merchants acquired a number of privileges and the trade grew to considerably larger dimensions.[370] After the decline of the fairs of Champagne there was little commerce with the interior of France because of the general hostility created by the Hundred Years' War.[371]

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[358] Rymer, *Fœdera,* V, p. 763.

[359] Above, p. 327.

[360] Schanz, I, pp. 291–292. *Munimenta Gildhallæ* (Rolls Series), I, pp. 228, 348, 418, 424, 426, 542.

[361] Huvelin, p. 264.

[362] *Ib.,* p. 251.

[363] *Ib.,* p. 252.

[364] *Munimenta Gildhallæ* (Rolls Series), I, pp. 418–428; II, pp. 64–66.

[365] Above, pp. 169–170.

[366] Schanz, I, p. 293.

[367] *Ib.,* p. 298.

[368] *Ib.,* p. 298, n. 6.

This brief survey has shown us how considerable was the part that the foreign merchants played in the early commercial development of England. The machinery of credit and finance lay entirely under their control, so much so that in the middle of the XIV Century there were in all England only 169 native merchants who were sufficiently rich to help make a loan to Edward III,[372] and most of the international trade of the country was in their hands, too. But from the middle of the XIV Century the foreign merchants had to meet the ever-increasing opposition and competition of the native merchants, so that if the history of English commerce up to that time is largely a history of the foreign merchants, its history thereafter and until the times of the Tudors is largely a history of the conflict between the foreign merchants and the native merchants, and we must say something of its earlier stages. In it we shall find various elements, the primitive dislike and suspicion of the alien, the narrow desire of the gilds for an exclusive monopoly, the larger motive of competition, the early view that the country was made poorer by allowing money to leave it.

In the earliest period, as we have seen,[373] the words "alien" and "enemy" were very nearly synonymous, and the alien had no legal rights,[374] a condition that continued into and beyond the XIII Century; [375] he had to seek the royal license to enter the country [376] and his stay was limited and hedged round with definite restrictions,[377] a condition that continued until after the XIV Century. For this reason an alien sought not only the royal license but the royal pro-

[369] Schanz, I, p. 298.
[370] *Ib.*, p. 299.
[371] *Ib.*, pp. 304–305.
[372] *Rot. Parl.*, II, 456.
[373] Above, p. 328.
[374] Schanz, I, p. 379.
[375] Tijdschrift voor Rechtsgeschiedenis, III, pt. 2, pp. 175, 203–204.
[376] Above, p. 328. Schanz, I, p. 380.
[377] Above, p. 328.

tection,[378] just as on the Continent,[379] and he obtained it, for a consideration. The alliance thus formed endured for some centuries, for by it the merchants obtained protection and special privileges and the King obtained an additional source of revenue.[380] But the commerce of the foreigners was also to the advantage of the nobles and of the country folk, for the foreigners offered a better price for their products, such as wool, hides, and tin, than did the native burghers, and the foreigners brought from abroad luxuries which were unobtainable in England; moreover, they sold products which were obtainable in England more cheaply than the monopolistic gild members.[381] It is for these reasons that we find the barons supporting the foreign merchants against King John.[382] It had been customary for the King to receive fees for his licenses and also various tolls and customs from the foreign merchants in return for the protection and the liberty that they enjoyed. When these payments were established and when the number and the amount of the royal demands were increased, to the consequent detriment of the merchants and their customers, the new and increased demands were known as evil tolls.[383] It was the policy of Henry II and his sons to favor the foreign merchants, but in return they exacted as high dues as self-interest would permit, having regard to the possibility of causing commerce to cease because it was unprofitable.[384] At the same time, individual merchants made private bargains with the King in order to obtain special privileges and exemptions.[385] At the commencement of the reign of King John the foreign merchants seem to have had their charters collectively confirmed by general letters patent,[386] but he later increased the payments arbitrarily and very considerably, and the merchants and their merchandise suffered severely from his greed.[387] This strangling of the foreign merchants' trade by increasing their burdens was altogether contrary to the interests of the barons, who inserted Chapter 41 in the Magna

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[378] Worms, p. 108. Tijdschrift, III, pt. 2, p. 175.

[379] Above, p. 131.

[380] McKechnie, p. 468.

[381] Worms, p. 108.

[382] McKechnie, p. 469.

[383] Walford, p. 21, n. 1. McKechnie, pp. 465, 468.

[384] McKechnie, pp. 466–467.

[385] McKechnie, p. 467, citing Madox, *Hist. and Antiquities of the Exchequer*, 2nd ed. (1769), I, pp. 467–469.

[386] McKechnie, p. 467. Worms, p. 119. Schanz, I, p. 381.

[387] McKechnie, p. 464.

Carta to preserve the merchants' rights,[388] and the better opinion seems to be that this chapter was intended to apply primarily to foreign merchants.[389] Unfortunately, the reissue of the Charter in 1216 deprived Chapter 41 of most of its force.[390] At the same time, a fruitful seed of legal conflict was being sown in the Charters which the boroughs were obtaining, directed against the foreign merchants. That of Bristol, granted by King John when Count of Morton, provided that no foreign merchant should buy wool, corn, leather, or other goods within the city from a non-burgher; that no foreign merchant should keep a hostel in the city, but only aboard his ship; that foreign cloths should be sold only on market days and by the ell; and that the merchants should not remain in the city more than forty days. This charter was confirmed by Henry III, and subsequently.[391] In London the regulations were also very strict. The foreign merchant had to live in the house of a burgess; he could not sell at retail; he could not dye cloth or work on it; he could only purchase goods from a burgess and might buy nothing for resale within the city; he might sell cloth only on three days a week and only within a certain area; he had to take back his first offer if a burgess wished to acquire anything that he was about to buy; he could stay but forty days in London; and he could not take away with him unsold goods which he had imported.[392] These charters are typical of the period, as coming from two of the largest towns, and the smaller places also had various regulations of their own.[393] On the other hand, the merchants had many charters, both of a special and a general nature, and the inconsistencies and conflicts were numerous, as Pollock and Maitland have shown:[394] "Mere common law has little to do with these foreign merchants. Their business takes them into the chartered towns. The law under which they live is a mesh of privileges and of privileges that are hardly consistent. They themselves will have charters derived from the king; but they will be living in boroughs which have charters derived from the king, and first and foremost among the rights for which the burghers long is the right of confining the activity of foreign merchants within narrow bounds. The conflict goes on with varying fortunes from century to century. On the whole the king, the prelates and barons support the merchants; they are useful, they lend money, they lower prices, they will pay for favours, but often a weak king must give way and yield to the complaints of the burghers. Already the Great Charter provides that merchants may freely enter and dwell in and leave the realm; but the same Great Charter confirms all the ancient liberties and customs of London and the other boroughs, and thus takes away with one hand what it gives with the other.[395] The burghers have a very strong opinion that their liberties and customs are infringed if a foreign merchant dwells within their walls for more than forty days, if he hires a house, if he fails to take up his abode with some responsible burgher, if he sells in secret, if he sells in detail. In Henry III's day the struggle is but beginning," and we find the foreigners beginning to settle in England in considerable numbers. No longer was it the custom to purchase individual licenses; they were acquired by whole cities and districts,[396] and the customs of London were infringed with the connivance of the king,[397] so that at this time it became usual for foreigners to live in their own houses and not to be "put to host."[398] When the London burghers complained of this no relief was given them. They later sided with the king's enemies in the Baron's War, and after the royal victory at Evesham the capital shared in the punishment. The foreign merchants were especially favored and in 1266 Prince Edward was made their protector and given authority over the issuance of licenses to them.[399] In 1275, in his first Parliament, a tariff was fixed, at the request of the merchants, on most of the important English exports, and these were later called *magna et antiqua custuma* to distinguish them from the taxes agreed upon in 1303 and known as the *parva et nova custuma*.[400] Edward especially watched over the privileges of the foreign merchants during his conflict with the city of London, whose liberties he confiscated in 1285 in order to suppress abuses.[401] In 1298 the city's privileges were restored and the encroachment by the city upon the alien's rights soon began again.[402] In 1301 we find the Londoners taking advantage of the King's preoccupation in the French and Scotch wars to deprive the foreigners of their privileges; the burghers wrote very independently to the king as to what they would compel the foreign merchants to do, and they insisted on the rights of *hospitium* (hostage) and of restricting the foreigners to a stay of forty days.[403] At this time Edward had been trying to increase his revenues and had met with a determined opposition from the English towns. The foreign merchants, on the other hand, had agreed to a new toll of fifty per cent of the old one. Edward's reply to London, therefore, was to issue the Carta Mercatoria, by which the provisions of Magna Carta became a reality, and we have seen that in it he made provisions for a special remedy if the courts of London did not administer a prompt and speedy justice.[404] Such began to be the case, not only in London but elsewhere, as we have shown above,[405] and the growth of the national commerce created a feeling of rivalry that led to an even greater prejudice against the foreign merchants, so that it was difficult to have justice done to them in the local courts. Certain of the groups had their own special jurisdictions, like the Hanseatics,[406] but for the rest some new machinery had to be devised. This could not be the common law, since at this time the alien was almost, if not wholly, rightless before its courts,[407] and Littleton laid it down as a rule that an alien could bring no action, whether real or personal.[408] Such was certainly the case as regards the disability of an alien to hold land,[409] but, for the rest, if such ever was the law [410] it was beginning to be questioned by the courts in the second half of the XV Century.[411] The distinction was at once made between alien friends and alien enemies. In 1454 it was held that if an alien possessed the King's license and a safe conduct he could bring trespass against one who had broken into his house,[412] unlike an alien enemy, who could not sue at all. In 1480 it was assumed that an alien friend could maintain an action of debt on a covenant,[413] and in 1484 it was said that if he were robbed he ought to have restitution.[414] This shows us that even at this time the common law courts were beginning to seek the legal business of the alien merchants. If they had not done so at an earlier time it is perhaps because of the special circumstances of the alien merchants.

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[388] The thirty-first paragraph of the articles of the barons of 1215, *Statutes of the Realm*, I, p. 7, is the basis of Chapter 41 of Magna Carta, *ib.*, I, p. 11. "All merchants shall have safe and secure exit from England, and entry to England, with the right to tarry there and to move about as well by land as by water, for buying and selling by the ancient and right customs, quit from all evil tolls, except (in time of war) such merchants as are of the land at war with us. And if such are found in our land at the beginning of the war, they shall be detained, without injury to their bodies or goods, until information be received by us, or by our chief justiciar, how the merchants of our land found in the land at war with us are treated; and if our men are safe there, the others shall be safe in our land."

[389] McKechnie, p. 465.

[390] *Ib.*, p. 470.

[391] Schanz, I, pp. 383–384.

[392] *Ib.*, pp. 384–385. Also *Munimenta Gildhallæ* (Rolls Series), I, pp. xcv, 492–494. *L. Q. R.*, XXXVI, p. 403 ff.

[393] *Black Bk. of Adm.*, II, pp. 115–119, 129, 147, 153, 159.

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[394] Pollock and Maitland, *H. E. L.*, I, pp. 464–465.

[395] In Chapters 13 and 41 of Magna Carta, *Stats. of the Realm*, I, pp. 10–11.

[396] Schanz, I, p. 386.

[397] McKechnie, p. 471.

[398] Schanz, I, p. 386.

[399] *Ib.*, p. 388.

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[400] McKechnie, p. 471.
[401] Schanz, I, p. 389.
[402] McKechnie, pp. 471–472.
[403] Schanz, I, p. 390, n. 6.
[404] *Munimenta Gildhallæ* (Rolls Series), II, p. 208.
[405] Above, p. 273.
[406] Above, pp. 363–364.
[407] Tijdschrift voor Rechtsgesch., III, pt. 2, p. 175.
[408] Littleton, § 198.
[409] Tijdschrift voor Rechtsgesch., III, pt. 2, p. 202.
[410] *Ib.*, p. 203.

> "It is no doubt true that, owing to the difficulties thrown in their way by the privileges of the boroughs, who were jealous of the foreign merchants, they were in practice forced to rely upon the special courts where the law merchant was administered, and on the king's extraordinary jurisdiction; so that it is not altogether surprising that it should be said in 1473 that alien merchants ought to sue in the Chancery, and that their cases ought to be determined there, not according to the law of the land, but according to the law of nature." [415]

But it would seem that this result had been produced, not because the courts of common law had ever held that they would give them no remedy, but because the privileges of the boroughs made it in practice difficult for them to get a remedy.[416]

> "All along it is as men privileged by the king, rather than as men subject to ordinary law, that the foreign merchants get a hearing. They

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[411] Tijdschrift voor Rechtsgesch., III, pt. 2, p. 205.

[412] *Y. B.* 32 Hen. VI, Hil. pl. 5. *Y. B.* 13 Edw. IV, Pasch. pl. 5, f. 9, also mentions an alien merchant as having a safe conduct.

[413] *Y. B.* 19 Edw. IV, Hil. pl. 4.

[414] *Y. B.* 2 Rich. III, Mich. pl. 4.

[415] *Y. B.* 13 Edw. IV, Pasch. pl. 5, 6, 9. "Le Chancelor. Cest suit est pris par un marchant alien, que est venus per safe conduit icy, et il nest tenus de suer solonques le ley del terre a tarier le trial de xii homes, et auters solempnities del ley de terre, mes doit suer icy et sera determine solonque le ley de nature en le Chancery et il doyt suer la de heur en heur et de jour per le spede des marchants. . . . Et coment que ils sont venus deyns le royalme, pour ce le Roy ad jurisdiction d'eux de mitter d'estoyer a droit, etc., mes ce sera secundum legem naturæ que est appell par ascuns ley Marchant que est ley universal par tout le monde." Similarly, Yelverton says, in *Y. B.* Mich. 8 Edw. IV, f. 12b (1467) "we will now do in this case, as the canonists and civilians do when a new case arises uncovered by previous law. Then they resort to the law of nature, which is the foundation of all laws, and therefore what commends itself to them as most beneficial for the common weal."

[416] Tijdschrift voor Rechtsgesch., III, pt. 2, p. 204.

can seldom make their way to the king's justices because the towns in which they live claim an exclusive cognizance of actions brought against the burgesses, and when the foreigners do get to the royal courts there is a contest between privilege and privilege." [417]

The foreign merchants, therefore, who possessed no special privileges, did not want to sue in the local courts and yet could not sue in the common law courts. They found their legal redress in the special jurisdiction of the King as exercised in his Council [418] and in Chancery, and also before the new courts of the Staple.[419] Among the reasons which led to the passing of the Statute of the Staple in 1353 was the desire to provide a special court for the foreign merchants,[420] in which the law merchant (again recognized as a separate and distinct body of law, following the precedent of the Carta Mercatoria) [421] should be administered. The new court, in its procedure, in the law that was applied, and in its control by the merchants themselves, reflected the type that prevailed all over the Continent.[422] The statute declared one of its purposes to be "to give courage to merchant strangers to come with their wares and merchandise into the realm." [423] By the same and other chapters justice was to be done to all foreigners from hour to hour and from day to day, according to the law merchant and not according to the common law or the special customs of any town,[424] for the fact was recognized "that merchants may not often long tarry in one place for levying of their merchandises." In order to secure these mercantile courts from encroachments on the part of the common law tribunals, the statute declared that "In case our bench or common bench, or justices in eyre or justices of assize, or the place of the marshalsea, or any other justices come to the places where the said staples be, the said justices nor stewards, nor marshals, nor of other the said place shall have any cognizance there of that thing, which pertaineth to the cognizance of the mayor and ministers of the staple," but cases of freehold or of felony were to come before the King's courts.[425] The statute further provided for the annual election of a mayor of the

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[417] Pollock and Maitland, *H. E. L.*, 2nd ed., II, p. 466.

[418] *Select Cases before the King's Council* (Selden Soc.), pp. xxvii–xxviii, lxx, lxxvi–lxxviii, xcviii–c, 32–33, 42–47, 76–77.

[419] Stat. 27 Edw. III, st. 2.

[420] *L. Q. R.*, XVII, p. 64.

[421] *Munimenta Gildhallæ* (Rolls Series), II, p. 207. Mitchell, p. 113.

[422] *Sel. Essays Angl. Am. Law*, III, p. 38.

[423] Stat. 27 Edw. III, st. 2, c. 2.

[424] Chs. 2, 8, 19, 20.

[425] Stat. 27 Edw. III, st. 2, chs. 5, 6, 8, 21.

Staple in each town where a Staple court was held,[426] and for two constables, the electors being the commonalty of the merchants, both foreigners and natives, and the authorities of the town were ordered to be attendant on them.[427] The mayor of the Staple was required to have "knowledge of the law merchant," and "to do right to every man after the law aforesaid," [428] and he and the constables were to have the assistance of two alien merchants, one chosen from among the merchants who came from the North and the other from those who came from the South.[429] The court was empowered to keep the peace and to arrest offenders for debt, trespass, or breach of covenant; [430] the mayor was also to have recognizances of debt and a special seal was provided for the purpose.[431] Alien merchants were not to be impleaded before any other court save that of the Staple, and cases in which they were concerned were to be tried by a mixed jury, but denizens had the option of suing at the common law if they preferred to do so.[432] A speedy means was provided for the recovery of goods of which merchants had been robbed at sea, or which had been cast away and thrown upon the shore.[433] An appeal in cases of difficulty lay to the Chancellor and the Council,[434] and it was later provided by statute that such an appeal lay from the Staple court of Calais.[435] These rights were expressly stated to be granted notwithstanding any privileges, franchises, or exemptions previously granted to any towns or individuals.[436]

Few records of the Staple courts have been preserved [437] and only two cases tried in them have yet been printed,[438] so that we cannot now state the content of the body of substantive law which must have grown up about their proceedings. We do know, however, that the proceedings of the court were subject to the supervision of the Council [439] and of the Chancellor,[440] and that cases were sometimes removed, just as in the Admiralty. In these courts of the Staple the law merchant was administered during the rest of the period which this chapter covers, as regards ordinary cases, and the Staple courts were generally like the usual courts of commerce on the Continent. For instance, the main object of the court of the Staple at Calais was to draw to itself all civil actions in which staplers were in any way concerned within its jurisdiction, in order to accelerate the course of justice and to lessen its expense.[441]

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[426] Stat. 27 Edw. III, st. 2, c. 1, for a list of the original Staple towns, which were often changed; see also *L. Q. R.*, XVII, pp. 56 ff. At first there were eleven towns in England, one in Wales, and four in Ireland.

[427] Stat. cit., chs. 8, 21.

[428] *Ib.*, c. 21. Mitchell, p. 73. "The court evidently constituted a lay tribunal similar to the maritime courts of Spain and the later commercial courts of France."

[429] Stat. cit., c. 24.

[430] *Ib.*, chs. 8, 21.

[431] *Ib.*, c. 9.

[432] *Ib.*, c. 8.

[433] *Ib.*, c. 13.

[434] *Ib.*, chs. 8, 24.

[435] Stat. 27 Hen. VI, c. 2.

[436] Stat. 27 Edw. III, st. 2, c. 28.

[437] Gross, *Select Cases, Law Merchant*, p. xxvii.

[438] *Ib.*, pp. 113–114, Westminster, 1401; pp. 116–121, Exeter, 1428.

But we must now return to the conflict between the native merchants and the foreign merchants, which we had carried up to 1303. We need hardly say that the citizens of London intensely disliked the Carta Mercatoria, and they assailed it after the accession of Edward II. Their opportunity came in 1311 when a temporary community of economic and political interests resulted in their alliance with the barons, and their combined efforts compelled the king to reverse for a time his father's policy of favoring the foreign merchants.[442] They forced the Ordinances on the king, including the revocation of the Carta Mercatoria "because the same was made contrary to the Great Charter and the franchise of the City of London, and without the assent of the Baronage," and it was ordained that "henceforth Merchant strangers shall come, abide and go according to the ancient customs, and according to that which of old they were wont to do." [443] Apparently, this provision was intended to exclude alien merchants from selling at retail, for instance; anyway, it was so interpreted by the Londoners.[444] At this time they secured a modification of the Statute of Merchants of 1283,[445] and it was ordained that the summary action for debt should be applied only against merchants.[446] At the same time the cities had also secured the repeal of a number of taxes.[447] In 1312 Edward consented to an ordinance by which foreigners were permitted to stay in London for but forty days and in 1316 he forbade all foreigners, with the exception of the

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[439] *Select Cases before the King's Council* (Selden Soc.), p. 110.
[440] Gross, *Select Cases, Law Merchant*, pp. 113, n. 2., 116, n. 1.
[441] *L. Q. R.*, XVII, p. 65.
[442] McKechnie, p. 472.
[443] Stat. 5 Edw. II, c. 11.
[444] Schanz, I, p. 394.
[445] Stat. 11 Edw. I.
[446] Stat. 5 Edw. II, c. 33
[447] Schanz, I, pp. 393–394.

Hanseatics, from selling at retail, from acting as brokers, and from having their own houses;[448] in 1319 he excluded all who were not burghers from the retail trade in wine and in other goods.[449] But in 1322 the successes of the king over the barons led to the restoration of all their privileges to the foreign merchants, in consideration of the old taxes being brought into force again.[450] The reaction of the citizens was violent. Their dislike was especially strong against the Italians, who for some years had exclusively farmed the mines of Devon and Cornwall and who had made £118,000 in return for loans that they had made the king. The Londoners attacked the Italians and the houses of the company of the Bardi in London were plundered and burnt.[451] In 1326 the freedom of the city was withdrawn from all aliens.[452] Under Edward III the conflict continued, for it was necessary for him to support his enterprises with the assistance that he got from the foreign merchants, as we have seen.[453] The statute of 1328 which abolished the "staples beyond the sea and on this side" further provided "that all merchant strangers and privy may go and come with their merchandises into England, after the tenor of the Great Charter."[454]

Under Edward III, about 1337, the foreign clothworkers seem first to have come to England in any numbers, and they then settled in the largest cities, such as London and York, and in Norfolk; in the XIV Century the woolen industry was still fundamentally and overwhelmingly native.[455] The foreign merchants seem to have come at a time when there was a reaction in their favor. In 1335 Parliament established the principle of freedom of trade for the alien merchants, which had been enunciated in the Carta Mercatoria. The preamble of the statute[456] says that a general complaint has been made "that in divers cities, boroughs, ports of the sea, and other places of [the King's] realm, great duress and grievous damage have been done to him and his people by some people of cities, etc, which in long time past have not suffered, nor yet will suffer merchant strangers . . . to sell or deliver such wines, livings, victuals, nor other things to any other

[448] Schanz, I, p. 394.
[449] *Munimenta Gildhallæ* (Rolls Series), I, pp. 142–143.
[450] Schanz, I, pp. 394–395.
[451] *Ib.*, I, p. 395.
[452] *Select Cases before the King's Council* (Selden Soc.), p. lxxvii.
[453] Above, pp. 359–361.
[454] Stat. 2 Edw. III, c. 9.
[455] *E. H. R.*, XXXIX, pp. 22–23.
[456] Stat. 9 Edw. III, st. 1, c. 1.

than to themselves," as a consequence of which prices are increased and the customer injured. It was therefore enacted that alien merchants were to have freedom to sell and if a borough hindered them it was to lose its franchise, while an interfering individual was also to be punished severely. If the liberty to trade at retail was included in this statute it did not amount to much, for a charter of 1337 abolished exemptions in favor of retail trade by aliens, any statute to the contrary notwithstanding.[457] Otherwise, the statute was important, for both aliens and denizens were placed on an exact equality as regards trade, and the special privileges of the chartered boroughs were swept away.[458]

In 1351 another statute threw open the retail trade, "notwithstanding any franchises, grants, or custom used," [459] and this was confirmed in the Statute of the Staple,[460] which also granted the merchants several other privileges. They were taken under the king's special protection; [461] they were protected against purveyance while going to and returning from Staple towns; [462] and they were to have lodgings in the towns at a reasonable price.[463]

Now the primary importance of the Statute of the Staple was fiscal,[464] and for this reason it prohibited all natives from engaging in the actual export of wool. This was altogether to the interest of the king, since the foreign merchants paid taxes fifty per cent higher than those of the natives, and it was a necessary protection for the foreign merchants, since otherwise the natives would have been able to undersell them in the foreign markets. In the home market denizens and aliens were equally permitted to purchase wool in the counties and towns and to bring it to the ports.[465] It was only natural that such regulations as these, which completely excluded denizens from the export trade and compelled them to share the internal trade, should cause much jealousy of the foreign merchants. There was, indeed, a riot by the London mercers against the Lombards in 1359.[466] The exclusive rights of the foreign merchants in the export trade were renewed by statutes

[457] *Select Cases King's Council* (Selden Soc.), p. lxxvii, n. 10.
[458] McKechnie, *Magna Carta*, pp. 472–473.
[459] Stat. 25 Edw. III, st. 3, c. 2.
[460] Stat. 27 Edw. III, st. 2, c. 11.
[461] *Ib.*, c. 20.
[462] *Ib.*, c. 4.
[463] *Ib.*, c. 16.
[464] *L. Q. R.*, XVII, p. 62.
[465] Stat. 27 Edw. III, st. 2, c. 3.
[466] *Select Cases King's Council*, p. lxxvi.

in 1363 [467] and 1367.[468] This period seems to have been the high water mark of the foreign merchants, and the ebb soon began,[469] although, of course, it is hardly noticeable at first.

Since 1371 there had been a continuous struggle over the trading privileges of the Hanseatics. The English complained that money was being carried out of the country instead of merchandise, that the Hanseatics were keeping their own special inns, that Englishmen abroad were not being treated in a reciprocal way by the Hanseatics, and that they and their ships were often arrested or detained abroad in a manner that called for reprisals.[470] The latter two complaints were probably true, for it was always the policy of the Hansa to keep the Englishmen out of the Baltic and away from Scandinavia and Iceland. And so, in response to the popular clamor, Richard II suspended the Hanseatic charter in 1378,[471] but he restored it in 1380.[472] On their side the Hanseatics had a long list of counter complaints.[473] In 1376 the privileges of the foreign merchants began to be narrowed as a result of the petitions from the cities, and foreigners were no longer permitted to manufacture goods, to act as brokers, or to sell at retail.[474] In 1378 the parliament of Gloucester passed a statute permitting the general free trading of the foreign merchants; [475] but the fact that the followers of Wat Tyler massacred the Flemish bankers and weavers in 1381 shows that they were not popular.[476] Under the influence of John of Gaunt, however, Richard granted many privileges to the towns, which had declared for him, and the Londoners enlarged their privileges.[477] However, the parliament of 1382 showed the same strong feeling in favor of unrestricted commerce, and passed statutes encouraging foreign merchants to trade and providing that no impediment was to be placed either in the way of foreigners or of denizens to hinder their trade in victuals or fish.[478] But in 1388, when Richard came under the control of Gloucester,[479] the native merchants lost all their advantages by a new statute which revived the old laws of Edward III favoring the foreign merchants.[480] In 1390, when Richard had just declared himself of age, it was commanded that the natives should treat the foreign merchants well, in order to induce them to come into the kingdom,[481] and at the same time the prohibition against the export of staple wares by denizens was renewed.[482]

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[467] Stat. 38 Edw. III, c. 6.

[468] Stat. 42 Edw. III, c. 8.

[469] Schanz, I, p. 398.

[470] *Rot. Parl.*, II, 306. *Cal. Pat. Rot.*, 50 Edw. III, 389, 390 ff.

[471] *Cal. Cl. Rot.*, 1 Rich. II, 66.

[472] *Rot. Parl.* III, 52.

[473] *Ib.*, III, 253. *Cal. Pat. Rot.*, 15 Rich. II, 518.

[474] Schanz, I, pp. 399–401.

[475] Stat. 2 Rich. II, st. 1, c. 1.

[476] *Mediæval England*, Ch. XIV, p. 586.

[477] Schanz, I, p. 401. *Select Cases King's Council* (Selden Soc.), p. xci.

[478] Statt. 5 Rich. II, st. 2, c. 1; 6 Rich. II, st. 1, c. 11.

[479] Schanz, I, p. 402.

The onslaught against the Hansa still continued, for the Hanseatics opposed the efforts of the English to share in the Baltic trade and as a consequence the opposition to them in England was stiffened. Already in 1391 the king renewed their privileges for only two years, but under Henry IV they were renewed once more.[483] Richard II remained at heart a friend of the English towns; in 1393 he returned to this his earlier policy of favoring them and in 1398 he expressly ratified their charters and privileges.[484] Nevertheless, the Londoners supported Henry IV in his usurpation and he treated them and the general interests of the English merchants with favor; in 1400 he permitted six Hanseatics in Boston to be seized and held liable for the violence which English merchants had received at the hands of their fellow-members in Bergen in 1390 and in 1399.[485] Yet he permitted the Venetian captains a civil jurisdiction as regarded their own affairs, but he required security to be given for the purchase of provisions.[486] More and more the English merchants were beginning to insist on commercial reciprocity, and so, in 1404, Henry IV agreed to a law whereby foreigners were to receive the same treatment in England that was meted out to Englishmen in the foreign country.[487] But, as it stood, neither the denizens nor the aliens were satisfied with the new law. The Italians were not permitted, as they desired, to have their disputes with Englishmen settled before the King's Council or the city officials according to the law merchant instead of *par enqueste*.[488] Moreover, the Italian brokers were often mulcted by way of reprisal of large sums which had been entrusted previously by Englishmen to defaulting Italian brokers, and so they demanded, in self-protection and in order not to be continuously endangered by such individuals, that the Chancellor be permitted to banish any broker who appeared to be untrustworthy. To this the king agreed, but he made the banishment dependent on a demonstration that the broker concerned was really untrustworthy.[489] In 1404 the king enacted that merchant strangers must sell their merchandise within three months, that they might not trade with one another, and that they must "go to host." [490] The Londoners interpreted this act to mean all strangers and hence to include English merchants not free of the city, as regards doing business with the aliens.[491] There were many complaints from the country dealers in cloth and in 1406 a new act had to be passed permitting them to trade directly with the alien merchants, notwithstanding the privileges of London.[492] Henry also continued to support the English merchants in their endeavor to obtain a foothold in Scandinavia, and when the merchants of Lynn, who were the pioneers in this trade, complained of the treatment that they had received from the Hanseatics in Bergen he compelled the Hanseatics in Boston to give security to the amount of 2000 marks, which he did not give up until the representative of the League in Bergen had taken an oath to treat the English merchants in a more friendly way in the future.[493]

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[480] Stat. 11 Rich. II, c. 7, reviving 9 Edw. III, st. 1. c. 1. and 25 Edw. III, st. 3, c. 2.

[481] Schanz, I, p. 402.

[482] Stat. 14 Rich. II, c. 5.

[483] Schanz, I, p. 176.

[484] *Ib.*, p. 402.

[485] Rymer, *Fœdera,* VIII, pp. 684, 701, 736.

[486] Schanz, I, p. 121.

[487] Stat. 5 Hen. IV, c. 7; *Rot. Parl.,* III, 542.

[488] Schanz, I, p. 403.

Meanwhile, London went on and on in its endeavor to continue to restrict the privileges of the foreign merchants, to prevent all evasion of the new regulations, and to confine the merchants within narrow limits with regard to their residence, the duration of their stay, and the classes of purchasers to whom they might sell.[494] These regulations were by no means unanimously approved, for the clothmakers and small merchants from the country and from the lesser towns did not like the situation, since it was better for them to deal directly with the foreign merchants.[495] Many of the attempts made to restrain the foreigners were purely factious. For instance, a statute of 1414 had provided that in certain cases no one might act as a judge who did not possess a certain income arising out of land.[496] Now since aliens could hold no land it occurred to some of the English merchants to endeavor to extend this law to the courts of commerce in which the foreign merchants participated, in order to exclude them from taking part in the decisions.[497] Had this been successful it would have ended the usefulness of those courts, but Parliament gave the statute its proper interpretation.[498] On the other hand, the king could always grant dispensations from the Acts of Parliament to the foreign merchants, so that at the accession of Henry VI, when the commons granted tonnage to the King, it was on the express condition that the acts against restricting the dealings of the foreign merchants should not be enforced. Thereafter the Chancellor, who was engaged in trading enterprises with the Low Countries, so favored the aliens and especially the Flemings that in 1425 there was a riot in London.[499] During this time the merchants of the staple were trying to get completely clear of the common law, to which, as we have seen, they were partially subject, and they petitioned Parliament in 1427 that no case in which they were concerned might be tried at the common law, but the petition was not granted.[500]

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[489] Stat. 6 Hen. IV, c. 4; *Rot. Parl.*, III, 553.

[490] Stat. 5 Hen. IV, c. 9, confirming 4 Hen. IV, c. 15 as regards the purchase of goods in England and the prohibition of carrying money out of the realm.

[491] *Mediæval England,* Ch. XIV, p. 586.

[492] Stat. 7 Hen. IV, c. 9.

[493] Rymer, *Fœdera,* IX, p. 325.

[494] Schanz, I, pp. 405–406.

[495] *Ib.*, p. 404.

[496] Stat. 2 Hen. V, st. 2, c. 3.

Other laws of this period show the general dislike of the foreign merchant, but they were sometimes so unreasonable and so uneconomic that their working injured their proponents and the burghers themselves had to ask for their repeal.[501] Thus in 1429 it was provided that sales must not be made to foreign merchants except for spot cash,[502] but there was such a consequent stagnation of business in the cloth trade that the law had to be modified to permit credit to be given for six months.[503] To some extent this complaint of the English merchants was justified, for the *Libell of Englishe Policye,* written in 1436, seems to show that often the money was used by the Italians during this credit period in exchange operations, by which they made a double profit, often from the English themselves, because the Italians asked a discount of five per cent per month for prompter payments.[504] The *Libell,* too, demanded reciprocal privileges for the English in foreign countries and pointed out the strong position of England in controlling

[497] Schanz, I, p. 407.
[498] Stat. 8 Hen. VI, c. 29.
[499] *Mediæval England,* Ch. XIV, p. 586.
[500] *Rot. Parl.,* IV, 328.
[501] Schanz, I, p. 407.
[502] Stat. 8 Hen. VI, c. 24.
[503] Stat. 9 Hen. VI, c. 2.
[504] *The Libell of Englishe Policye,* ed. W. Hertzberg (1436), lines 396–433.

the raw material market in wool.[505] It appears to have had an effect, since in 1439 a statute was passed, directed against the Italians, to be in force for eight years, and providing that the foreigners were again to be "put to host" and compelled to live with a burgher who was to be a sort of censor and spy over them and who was to receive as reward a payment of twopence in the pound of all business transacted by the foreign merchant.[506] When the statute expired it was not renewed, for it was too rigorous, and it was sometimes evaded.[507]

We have seen that as far back as 1351 and 1353 Edward III had passed statutes declaring that there should be no reprisals made on aliens for debts unless the aliens were principals or sureties,[508] but these statutes, like so many others, apparently were not enforced, because the same privilege was obtained by the Italians from Henry IV and it may also be that he granted their request to appoint a special judge for cases concerning Englishmen and Italians or Italians alone,[509] so that they might not have to sue in the London courts. When the native merchants attacked the aliens the Italians were apt to receive the brunt of it.

There were also many complaints that the privileges of the foreigners should extend only to the import of their own goods, and not to those which were brought in by them for the account of others, a practice which had become fairly common. In 1439 the House of Commons brought in a bill to prohibit the import of goods by the Venetians unless the goods were of Venetian origin.[510] The whole carrying trade of the Venetians was at stake, and it had been on the increase since 1370.[511] But their influence was still considerable; they resorted to bribery and the passing of the bill was averted.[512]

The provisions of the Statute of 1439 were sometimes avoided by the Italians by leaving Southampton and London and by going into the country, where they were free from the restrictions of the cities and gilds,[513] just as many of the native merchants had had to do for similar reasons; [514] others of the Italians became burghers.[515] Many local taxes were laid on them, also, and usually at heavier rates than on denizens,[516] nor did the government venture to reject the demand of Parliament that the Lombards be subjected to the general regulations for aliens.[517] The workers and tradesmen of London, and with them many merchants of the Staple, had come to dislike the skilful but unscrupulous Italians more and more, and special regulations or schemes to keep up prices against them were made in London and in Bristol.[518] Their lives and property, they felt, were no longer safe, so in August, 1456, the Venetians, Florentines, Genoese, and Lucchese discontinued their business in London and emigrated to Winchester,[519] threatening to remain there until their grievances were redressed and even making definite plans to transfer all their commerce to Winchester and to Southampton.[520] But the government was still strong enough to secure a modification of the regulations and the Italians returned to London.[521]

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[505] *Ib.*, lines 87–95, 496–511.
[506] Stat. 18 Hen. VI, c. 4.
[507] Schanz, I, p. 411.
[508] Above, pp. 317, 354.
[509] Schanz, I, p. 122.
[510] *Rot. Parl.*, V, 31.
[511] Schanz, I, p. 120.
[512] *Ib.*, I, p. 122.
[513] *Ib.*, p. 411.
[514] *Select Cases King's Council* (Selden Soc.), p. lxxx.
[515] Schanz, I, p. 412.

With the outbreak of the Wars of the Roses the attention of the nation was fastened upon other matters, and the best days of the Italians were now over. Edward IV was at first not very favorable to the foreign merchants and, unless they possessed special privileges, he placed the colonies of workmen, who had come from abroad since the arrival of the first Flemish weavers in the time of Edward III, under the authority of the appropriate English gilds.[522] Some of his laws, also, were to their disadvantage, especially in the case of the Venetians.[523] The struggle for reciprocal treatment of the Englishmen abroad still went on. The king was on good terms with King Henry of Castile and in 1466 he concluded a general treaty of friendship by which the Castilian merchants were to be treated exactly like his own subjects, on condition of the English merchants enjoying the same treatment there.[524]

Meanwhile, a struggle was going on between the Merchant Adventurers and the Hanseatics, whose carrying trade and customs privileges were being attacked just as those of the Italians had been, especially with reference to the trade with the Netherlands.[525] It is not necessary to discuss its events in detail, but the Hanseatics triumphed. United with the Flemings and the Dutch they helped to restore Edward IV to the throne in 1471 [526] and they were rewarded with the Treaty of Utrecht in 1474,[527] by which they obtained many privileges. The Hansa was to be protected against the unauthorized exactions of customs and port officials; the city of London had to recognize all the privileges which the Hanseatics had acquired and all the treaties which they had made with the king, even though many of these privileges were contrary to the city's own liberties; the Hanseatics received the Gildhall and the Steelyard in London, the Steelyard in Boston, and a house in Lynn near the water; in all causes in which they were involved, even when concerning Englishmen, excepting capital offences, the king was to appoint two or more judges specially, who were to give decisions informally and at once; while in criminal cases, where the offence was not capital, half the jury was to be composed of Hanseatics; the merchants and mariners of the Hansa were to be wholly free from the jurisdiction of the Admiralty and of the other English Courts; the Admiral was not to claim deodands from them or from their ships; shipwrecked goods were to be restored if any living thing escaped to the land; the Hansa was to be allowed a weigher and cloth measurer of its own; it was to be exempt from certain internal tolls; it was permitted to sell Rhenish wine at retail. In return, similar provisions were to be made in favor of Englishmen in the Hanseatic cities and they were to be protected from new taxes there.[528] In this treaty the Hanseatic League reached the high water mark of its prosperity in England,[529] and the treaty continued almost entirely in force until the reign of Queen Elizabeth.[530]

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[516] Schanz, I, pp. 412–413.
[517] *Ib.*, p. 122.
[518] *Ib.*, p. 412.
[519] Goldschmidt, p. 186.
[520] Schanz, I, p. 122.
[521] *Ib.*, p. 412.
[522] *Ib.*, pp. 413–414.
[523] Stat. 4 Edw. IV, c. 1; c. 4 (1465).
[524] Rymer, *Fœdera*, XI, pp. 569, 587.

Richard III, also, was very anxious to conciliate the English merchants and the unpopular Italian merchants were singled out for persecution. Daily, the Venetians complained, the king placed new restrictions on their trade, so that they would soon be compelled to abandon their commerce with England; special licenses were no longer granted to them and many of the older restrictions were again put in force.[531] Before the end of the first year of Richard's reign there was passed "an act touching the merchaunts of Italy." [532] In the preamble the various offences of the Italians and the Catalans, who were grouped with them, were set forth: they kept households in London and in other cities, wherein they stored their goods until the price had risen; they freely bought and sold in gross and at retail all over the country; they violated the laws concerning bills of exchange; they acted as hosts to their fellow countrymen; they employed alien clothmakers to manufacture cloth for them, and it was therefore provided that these merchants should hereafter sell their goods within eight months after landing them, to Englishmen solely, and only wholesale, two more months being allowed to them as the limit in which to carry away the unsold goods; with the proceeds of their sales English goods were to be bought and wool or cloth bought in England was not to be resold there; foreign merchants were not to act as hosts to other foreigners unless they were of the same nationality; aliens were not to act as brokers between Englishmen in the purchase and sale of wool and cloth unless they had been naturalized; no Italian merchant, unless naturalized, was permitted to employ workmen to make cloth, and they were generally regulated as to other manufactures, though the printing and retail sale of books was not forbidden. The other foreigners seem to have escaped most of the provisions of this act.[533] To this low ebb had the fortunes of most of the foreign merchants come at the end of the XV Century, as a result of the repeated attacks of the English merchants. The Hanseatics were the best off, but they were to lose their privileges in the following century. This outcome was only natural and was the only thing to be expected. In the earlier days the foreign merchants had helped the country and had made the path of its development easy, but as the native commerce developed and acquired independent strength and as a true national feeling grew up it was to be anticipated that the native merchants would seek to break the monopolies and special privileges of the foreigners, to take the business of the country into their own hands, and to reach out abroad to capture foreign trade.

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[525] Schanz, I, p. 176.

[526] *Ib.*, I, p. 177.

[527] Rymer, *Fœdera,* XI, p. 793.

[528] Schanz, I, p. 178.

[529] *Mediæval England,* Ch. XIV, p. 594.

[530] Worms, p. 238.

Finally, we must refer briefly to the expansion of English commerce abroad towards the close of this period, and to the special jurisdictions

[531] Schanz, I, p. 123.
[532] Stat. 1 Rich. III, c. 9.
[533] Schanz, I, p. 416.

under which the English merchants sometimes lived when on the Continent, exactly as we have seen the Italian or German merchants doing when they were outside of their own countries. This, as we have noticed, was a characteristic feature of the mediæval commercial law. We have already referred above [534] to the early English commerce with Scandinavia, which appears to have been the earliest of any importance. In spite of the difficulties raised by the League and in spite of violence done them by the Hanseatics the English merchants continued to trade with Norway and Sweden, while they endeavored to put pressure on the Hanseatics at home through Parliament, as in 1377,[535] and through the king, as in 1391.[536] They were resolved not to abandon the field of battle, and in 1408 Henry IV granted to his subjects who traded with Scandinavia the right to choose governors or consuls among themselves,[537] probably wishing to strengthen their powers of resistance by organization. Finally, by the Treaty of Utrecht in 1474 the Hansa promised Englishmen reciprocal treatment in their cities,[538] although the privileges granted by the king were unilateral.[539] The commercial policy which England followed towards the Hansa rather resembled that towards Venice, since the underlying purposes were about the same: just as the Italians were restricted after having been encouraged for a time, in order that the English merchants might take their place and win the entry into the Mediterranean, even so was there a desire to destroy the privileges of the Hansa in order to make more room in the Baltic for the English flag.[540]

The Scandinavian charter of 1408, which we have just mentioned, was based upon an earlier one of 1404 by which Henry IV granted to the English merchants in the Hansa cities the authority to exercise jurisdiction through *gubernatores mercatorum* in the name of the king, a privilege evidently influenced in form by the privileges and self-government of the Hanseatics in London.[541]

From the beginning of the XV Century the English were forcing their way into the Mediterranean and organizing their commerce there, at first under the lead of single individuals from London, Bristol, and Hull.[542] The Genoese in particular viewed this intrusion with jealous eyes, and by repeated seizures of the goods of the English merchants they sought to dishearten them and to discourage their attempts.[543] But the merchants, instead, demanded strong measures in reply, and it was ordained in 1413 that nothing should be sold to the Genoese and that no one should travel to Genoa.[544] They also attempted to undermine the position of the Genoese with the king by showing that the customs had been defrauded, but the king contented himself with compelling the Genoese to make good the proper sums. Nevertheless, he also compelled them to give the English merchants free access to their harbors,[545] and later, under Edward IV, the Genoese had to share their special privileges in England with the other Italians.[546]

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[534] Above, p. 330.
[535] Schanz, I, p. 175.
[536] *Ib.*, p. 176.
[537] Rymer, *Fœdera*, VIII, p. 511.
[538] Above, p. 387.
[539] Schanz, I, p. 179.
[540] *Ib.*, p. 172.
[541] Silberschmidt, p. 19.

We have already mentioned the reciprocal treaty concluded between Aragon and England in 1351;[547] these relations were zealously kept up in the XV Century.[548] In 1418 Alphonso renewed his escort of the English merchants for three years,[549] which seems to indicate that they came by land from southern France to Barcelona. Towards the end of the century they seem to have come by sea.[550] We have elsewhere spoken of the close relations of England with Portugal.[551] The great voyages and discoveries of Portugal gave her a predominant place in the second half of the XV Century, and through her commerce with India she took the first place.[552] By all this the English merchants immediately benefited; their numbers, like their business, increased, and often their commerce was so great that they could not find sufficient ships of their own to carry it and had to hire Portuguese ships.[553] These commercial relations are a proof of the energetic activity of the English merchants at the beginning of the XV Century, and before. They used Portugal as they did Spain, as a port of call for their ships bound towards the inner Mediterranean, and their efforts, supported by their own government and by the traditional friendship of the peninsular countries, were successful.[554] Already in the XV Century the English were the most favored nation in Portugal, and in the XVI Century they achieved their true supremacy, for Portugal's weak industrial beginnings came to nothing and the gates were opened for the manufactures of England.[555]

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[542] Rymer, *Fœdera,* VIII, p. 717; X, p. 117; XI, p. 258. *Rot. Parl.,* IV, 50; V, 31.

[543] Schanz, I, p. 116.

[544] *Rot. Parl.,* IV, 14.

[545] Schanz, I, p. 116.

[546] *Ib.,* p. 117.

[547] Above, p. 368.

[548] Rymer, *Fœdera,* VIII, p. 617.

[549] *Ib.,* IX, p. 663.

[550] Schanz, I, p. 269, n. 8.

[551] Above, p. 368.

[552] Schanz, I, p. 287.

[553] *Ib.,* p. 288.

At the end of the XIV Century there also grew up a closer connection between England and Brittany, founded on the latter's need for English support as a counterbalance to the threatened absorption by the French, and this ripened into a political friendship that could almost be called dependency on the part of Brittany.[556] Just as the alliance of the Low Countries with the English kings against the French had important consequences for trade, so the results were the same in Brittany, and the treaty relationships between each group also almost coincide in the XV Century,[557] one treaty with Brittany being practically a copy of the Flemish *Intercursus Magnus*.[558] But as Brittany was not a wealthy country the trade with it was not relatively of great importance except that it shows us the ascendency of the English merchants there at this period.

Finally, we must speak of the English commerce with the Low Countries, which was by far the most important traffic of all and in which the chief strength of that commerce lay.[559] We shall also have to speak of the early Merchants of the Staple and of the Merchant Adventurers, and, since the traffic was chiefly concerned with wool and with cloth, we shall also have something brief to say of the development of that business in early times in England, for it was on the wool traffic with the Low Countries that the later English commerce was built up.

As we have already mentioned,[560] the merchants appear to us as a class set apart, and Stubbs draws an excellent comparison between them and the clergy and shows how they might possibly have become a separate legal estate in England[561] and how the great religious houses which were engaged in the production of wool formed a sort of connecting link. Certainly the export of wool was of great importance to England as early as the XII Century, and it was then the staple product of the country,[562] since quantities of it were commandeered for the ransom of Richard in 1194;[563] moreover, the origins of the Merchant Adventurers, who dealt in that commodity, may go back to the early years of the XIII Century.[564] Wool was always the subject of taxation and sometimes of seizure. In 1218 it was seized at Bristol and the merchants who owned it made a virtue out of a necessity and granted Henry III a subsidy of six marks the sack, probably preferring the form of a subsidy to that of a seizure;[565] in 1264 wool was seized by the barons;[566] and in 1275 we have the first legislative enactment concerning it.[567] The lords and *communitates* granted Edward I a heavy tax on each sack of wool, theoretically at the request and at the instance of the merchants. It may be that the merchants agreed to this tax in order to escape arbitrary seizures, and that Parliament recognized the situation.[568] The method was superficially constitutional but later royal attempts to increase the customs were resisted.

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[554] Schanz, I, p. 289.

[555] *Ib.*, p. 290.

[556] *Ib.*, p. 293.

[557] Rymer, *Fœdera*, VIII, p. 542 (1408); IX, p. 511 (1417); XI, p. 618 (1468).

[558] Schanz, I, p. 294.

[559] *Ib.*, p. 327.

[560] Above, p. 345.

As an evidence of the growing commercial importance of the wool exporters (and also of Edward III's financial difficulties with the Italians) may be mentioned the fact that when in 1339 he offered first to the English merchants the purchase of the large subsidy on

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[561] Stubbs, *Const. Hist.*, II, p. 191. "The merchant class, again possessed in the peculiar nature of their taxable property, and in the cosmopolitan character of their profession, grounds on which, like the clergy, they might have founded a claim for class representation. What the tithe was to the one class, the wool and leather were to the other; both had strong foreign connexions, and the Gilbertine and Cistercian orders, whose chief wealth was in wool, formed a real link between the two. Nor was the wool less coveted than the tithe by kings like Richard and John; the mercantile influence of Flanders and Lombardy might be paralleled with the ecclesiastical influence of Rome. It was perhaps the seizure of the wool of the Cistercians for Richard's ransom that led John to bestow special favour on that order, and then to make the special applications for help in return for those special favours, applications which could hardly be refused when the taxable fund lay so completely at the king's mercy."

[562] Schanz, I, p. 11.

[563] Stubbs, *Select Charters*, 9th ed., p. 441.

[564] Schanz, I, p. 336.

[565] Stubbs, *Const. Hist.*, II, p. 192.

[566] Stubbs, *Select Charters*, 9th ed., p. 441.

[567] *Ib.*, pp. 443-444.

[568] Stubbs, *Const. Hist.*, II, p. 192.

30,000 sacks of wool, voted by Parliament, they had some difficulties, but after 1345 an English group of merchants succeeded to the business of the Italians and called themselves "the king's merchants." [569]

From a much earlier period the English merchants had been organized in the Low Countries. There is great uncertainty as to the exact origin of the Company of the Merchant Adventurers. They claimed to possess a charter of 1216 from the Duke of Brabant, constituting them an organization similar to the Hansa,[570] and this seems quite possible in view of the close early relations of the Low Countries with England.[571] The dates 1248 and 1286 are also suggested; in any case it is certain that they were trading in Brabant in the XIII Century [572] and that there was a corresponding organization in England known as the Society of St. Thomas à Becket. It was in 1286 that the city of Antwerp, which was then seeking to attract merchants within its walls, granted privileges in which the English merchants shared by name,[573] and after that time there was a considerable commerce with Antwerp and still further privileges were granted.[574] Like all other foreigners when abroad, the English merchants wished to live under their own laws, and in 1305 those at Antwerp were granted the right to elect a consul to decide their differences and settle their affairs, although this privilege seems to have been first exercised by the Staplers,[575] and in 1315 the privilege was further extended.[576]

The origin of the Merchants of the Staple is equally unknown, but it is approximately contemporaneous with that of the Merchant Adventurers. The Staplers claimed that their origin went back to 1248 and even earlier, but they believed that they could prove the existence of a wool staple with the proper officials in 1266–1267.[577] The Staple itself was the earliest governmental organization of English commerce, and by it the most important articles which England exported were to be brought together in definite places for sale under the supervision of specially created officials. The organization arose out of the initiative of the government and not from that of the merchants, and the chief reason for its creation was financial.[578] It also arose out of a more advanced governmental policy towards commerce. We have seen that through the XIII Century and at the beginning of the XIV Century English commerce had been increasing. Up to this period it had chiefly been concentrated in the fairs and markets and in London.[579] The policy of the XIV Century, however, was to draw trade into a few selected towns in which were established continuous markets or staples, and not to be content with the occasional opportunities for trade which the intermittent fairs afforded. The same policy seems to have been pursued in Norway where Bergen was the staple for the Iceland trade, and in France where Philip did his utmost in 1314 to induce the English to frequent the staple at St. Omer instead of the fair at Lille.[580] Moreover, the collection of the customs was greatly facilitated when commerce was confined to but a few places, although, of course, it also developed a tendency to contraband trade.[581] In spite of this the staple system grew, and it may be that in general the merchants preferred to have a few definite and recognized meeting places for commerce; it is certain that the king was willing to confer privileges which would attract the merchants and lead them to comply with the regulations.[582]

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[569] *Mediæval England,* Ch. XIV, p. 585.

[570] *Ib.,* p. 599.

[571] Above, pp. 366–368.

[572] Schanz, I, p. 336.

[573] *Ib.,* I, p. 8.

[574] *Ib.,* p. 336.

[575] *Ib.,* I, pp. 336–337. "Poterunt etiam eligere suæ nationis consulem, qui de rebus omnibus ad ipsos spectantibus cognoscat."

[576] *Ib.,* pp. 8–9.

[577] *Ib.,* p. 329.

The Statute of the Staple, which we have chiefly examined above,[583] was the result. It had further subsidiary purposes: by it the quality of the exported goods was kept up and the weight of wool sacks, for instance, was certified by the mayor of the staple under his official seal.[584] Contracts, also, were given a special formality when recognized before the mayor and constables and sealed with the staple's seal,[585] and the recognizance "in the nature of a statute staple" afterwards became a usual form of security in the ordinary courts.[586] In the next place, the system was used to attract gold into the country, as the merchants were supposed to sell their goods for cash.[587] The statute was undoubtedly intended to benefit the foreigners, who paid larger customs than the natives,[588] but the English merchants derived many benefits, too. A number of the most important towns in England were named as staple towns and became very wealthy.[589] Usually one town was named on the Continent, too—sometimes Bruges or Calais [590]—"it appears to have been generally maintained in one of the wealthy cities of Flanders, no doubt because most of the English wool went thither to be made into cloth." [591] But in spite of the fact that the general export trade lay in the hands of the alien merchants, the English merchants were always permitted to trade as far as Calais when the staple was situated there, and even in spite of the severe restrictions the Merchants of the Staple rose to prominence.[592] It was they who naturally took the chief part in the administration of the staple system and of its courts, and so no doubt they managed to push the alien merchants out, little by little, for in the XV Century the mayor of the staple and the mayor of the staple town appear to have become amalgamated,[593] together with their jurisdictions.

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[578] Schanz, I, pp. 329–330. *L. Q. R.*, XVII, p. 62.

[579] Cunningham, I, p. 293.

[580] *L. Q. R.*, XVII, p. 61. Cf. the patent of 1313, cited *Mediæval England*, Ch. XIV, p. 600, which dwells on the mischiefs arising from allowing merchants, whether aliens or denizens, to ship wool to any port at choice.

[581] Cunningham, I, p. 418.

[582] *L. Q. R.*, XVII, p. 62.

[583] Above, p. 376.

[584] Stat. 27 Edw. III, st. 2 c. 1.

[585] *Ib.*, c. 9.

[586] *L. Q. R.*, XVII, p. 67.

The rise of the Merchants of the Staple to importance really began after the capture of Calais in 1347 and the subsequent fixing of the staple there. They had the monopoly of exported staple commodities and, until the reign of Henry VI, of provisions also. Between Dover and Calais they paid no tolls, and within somewhat larger limits no wreck belonging to them might be seized.[594] During the XV Century the Merchants of the Staple appear to have been incorporated, and they were a general fellowship composed of the English staplers.[595] The system of granting royal licenses to infringe the statutes still continued and at times seriously interfered with the monopoly of Calais, but they were sometimes withdrawn after the staplers had protested. The staplers also began to take the place of the Italian merchants in making loans to the king, and in the reign of Edward IV an assignment of the subsidy of wool, woolfells, and leather, for the payment of which security was taken from the shippers at the English ports, was made to the Merchants of the Staple of Calais in repayment of a loan of £20,000, advanced by them; at the same time the customs on certain wools were granted them permanently in consideration of their paying the expenses of the garrison at Calais.[596] The staplers were, in fact, the natural bankers of the English government at this time.[597]

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[587] *L. Q. R.*, XVII, p. 63.
[588] *Ib.*, pp. 59–60.
[589] Coke, *Inst.*, IV, 238.
[590] *L. Q. R.*, XVII, pp. 67–68.
[591] *Ib.*, p. 68.
[592] Cunningham, I, p. 314.
[593] *L. Q. R.*, XVII, p. 66.
[594] *Ib.*, p. 74.
[595] *Ib.*, pp. 71–73.

Meanwhile, the English merchants, or rather the Merchant Adventurers and the Merchants of the Staple, since every English merchant trading to the Low Countries was one or the other,[598] were gaining further legal and commercial privileges. In 1359 the company of the English merchants in Bruges had a governor at their head. In 1407 Henry IV granted a consular charter to the merchants trading with the Low Countries,[599] in which the Merchant Adventurers shared. This was the first known charter to the latter,[600] and at the same time they obtained a house in Antwerp.[601] The English merchants were granted a general jurisdiction including, apparently, a commercial one; [602] they were to assemble themselves in the different places of Brabant, Holland, Zeeland, and Flanders, to which the charter applied, and to elect a governor who was to settle their disputes and declare the law to them.[603] But these groups, as such, were unfortunately not able to make the best use of their opportunities, since they were but loosely bound together in most places, usually neither by companies nor gilds, and in England they did not keep together either but belonged to various gilds, so that later the kings could easily narrow the consular privileges when they were confirmed.[604] In 1430 the traffic of the English with Antwerp was still very important,[605] and in 1446 they were granted special customs privileges there by the Duke of Burgundy, while others were granted in 1450 by the city.[606]

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[596] *L. Q. R.*, XVII, p. 74.

[597] Schanz, I, p. 331, citing many early English authorities.

[598] *Ib.*, p. 332. The difference between the two societies was this: the Staplers exported raw materials; the Adventurers exported manufactured goods.

[599] Rymer, *Fœdera*, VIII, p. 464.

[600] Lingelbach, *The Merchant Adventurers of England*, p. 218.

[601] Schanz, I, p. 9.

[602] Lingelbach, pp. 218–221.

[603] Schanz, I, p. 339.

[604] *Ib.*, p. 340.

[605] *Ib.*, p. 9.

[606] *Ib.*, pp. 9–10.

In 1462 a charter of Edward IV set up a definite and extraterritorial jurisdiction in the Low Countries [607] for the benefit of English merchants and mariners "and to doe them full and speedy justice." [608] They were to join with the chief justice, who was appointed by name, in choosing twelve subordinate justices.[609] Other rulers were requested to uphold the authority of these courts and in return the king promised them reciprocity in England.[610] The law merchant, oddly enough, is not specifically mentioned in any of the passages given. Towards the close of the XIV Century the English were able to establish thoroughly their footing in foreign trade and it was at that time that the exports were beginning to be organized in the hands of the Merchant Adventurers and the Staplers.[611] In the XV Century the relations between England and Flanders became much less cordial, one reason being the increase of the English cloth making industry. As early as 1338 the wearing of all cloth made outside of England had been prohibited and alien cloth makers had been invited to settle in England, with promises of protection and privileges, a policy that was fairly steadily kept up in later reigns and whose increasing success in the reign of Henry IV started the process of disintegration of the Staple, whose chief welfare depended on the export of wool. In the time of Edward III the revenue from the staple commodities had been as much as £68,000, but in that of Henry VI in 1449 it had shrunk to £12,000, and by the close of his reign the prosperity of the Staplers was at a low ebb. It was further challenged by the Merchant Adventurers, who, with more favorable conditions, were out-stripping them.[612] Necessary as the export of wool had been to English commerce the new trade in cloth was beginning to oust it from its place, and the Staplers, with their efforts to maintain their monopoly so rigidly, became a clog on commerce and were in eventual opposition to even the most primitive economic ideas of the day.[613]

Finally, it must be noted that at the close of this period the new cloth exporting trade was becoming established upon a basis of credit and monetary exchange which was making commercial paper quite familiar to the average English merchant, although its results lie outside of our period in the later Tudor times, and its growth was hampered at first by a general opposition to "usury." [614]

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[607] Lingelbach, pp. 221–228.

[608] *Ib.*, p. 224.

[609] *Ib.*, p. 225.

[610] *Ib.*, p. 228.

[611] Cunningham, I, pp. 290–291.

[612] *L. Q. R.*, XVII, pp. 74–75.

[613] *Ib.*, p. 76.

The Italians seldom paid cash. When the wool or tin was sold in Italy the money was remitted, by exchange, to Flanders, the Italians drawing on their fellow countrymen. Others bought wool in Calais, brought it to Bruges, disposed of it there at a moderate price, and put the money out at interest, paying the sum when due and making the chief profit on the loan. At times it was attempted to prohibit this crediting by law, for the English naturally lost by it, but the effect actually was that the English trusted the newly developing system of credit more and more and established their businesses on it. Under Henry VI and Edward IV most of the trade with the Netherlands, and soon with the German Hansa, was founded upon credit, while the English merchants very frequently drew bills of exchange upon one another. The smaller merchants were engaged in the actual business of the export of the goods, while the more wealthy merchants gave themselves over to the business of banking and credit,[615] so that in 1485, when Henry VII came to the throne, the credit transactions of the denizens were very considerable.[616] This is confirmed by almost contemporary documents found among the papers of Thomas Cromwell, which speak of the times just past, and a passage of one of them gives us an excellent glimpse at the usages of the period:

> "In exemplum the exchaunger owtward sekith either the stapler or straunger, that hath any money beyend see payable, and 'lakkith money here in England to be fayne to take money to his losse, for an English noble to giff a 4 or 5d the more for a five or six wekes respit to be paid ageyn at the mart of Flaunders. So dothe such exchaungers never bestowe ther money upon no English clothe nor other thyngs, wherby to wyne money as upon merchaundise owtward to pay any custome to the kyngs profite or for any profite of the reame, but only to wyne lucre as upon the loone and forberyng of his money. After which money so recyvid agayn in Flaunders with the gayn therof, sekith owt adventurers of London, who will receyve that money agayn to bestowe it upon straunge merchaundisez to bryng it in to England and for the loone of every noble to giff as moche wynyng to the exchaunger ageyn. In such wise rich old merchaunts, many men seeng the price of clothe and the daunger and trouble of byeng strange merchaundises is so casuall for

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[614] Schanz, I, pp. 548–556.

[615] *Ib.*, pp. 557–558.

[616] *Ib.*, p. 559.

> a more ease and lesse labour, they thus occupie ther money by exchaunge, wynnyng profite bothe inward and owtward, which is pleyne usary. Albeit they say, it is non usary, by reason, they say, they putt ther money in adventure, which adventure is not upon the see nor otherwise, but like as usary is accowntid usary to wyne profite by lendyng of money, seeng every such exchaunge for any some of money so lent by the name of exchaunge hath two billes obligatory for payment therof. Oon bill is to cary it over the see, wherby to receyve such money ageyn beyend see at the marts, and that other bill the exchanger kepith it for his sewertie in England to be sewer, if that other first bill shuld chaunce to be lost by adventure over the see, so as no colour of excuse can be made of puttyng such money in adventure, but as money lent by very kynd of usary havyng fewer bonds obligatory therefore."[617]

With such beginnings, therefore, we shall not be surprised when we find credit to be of much importance during the Tudor period.

During all this period whose study we have now concluded the English commercial law was serving a period of apprenticeship. Its principles were more primitive than the same principles were on the Continent, because of various reasons which we have had occasion to point out above, and the majority of English merchants were also somewhat cut off from contact, at first, with those of the Continent. Nevertheless, the general similarity of the English institutions to those of the Continent is striking and fundamental, and renders a careful study of the latter necessary in order not only to grasp the essential meaning and import of the former but also to place the English law in its proper perspective amidst the great international setting of European commercial law, of which it formed a part.

Now while in its broad lines the law of commerce was very truly international it nevertheless varied locally in less essential matters,[618] and we have seen that France, Germany, and Italy developed along slightly different lines. England, too, apart from its backwardness during this period, had its own special peculiarities, chief among which were the lack of political power of the towns, the lack of judicial power of the gilds, and the comparatively great strength of the royal power. The royal authority, for instance, as contrasted with the usage and custom of merchants elsewhere, intervened to establish uniformity in commercial matters,[619] whether in regard to the routine and procedure of the courts of commerce, or even as concerned the substantive law, as in the standardization of mercantile contracts and in the proof and swift recovery of debts.

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[617] Pauli, pp. 34–35.

[618] Mitchell, p. 115. "While the Law Merchant was in its broadest sense the body of commercial rules observed throughout Western Christendom, it must be remembered that each country developed to a certain extent upon its own lines."

But in the fundamental matters the English commercial law partook of an international nature: its courts sat from day to day and from hour to hour; their procedure was swift and summary, and by specially appointed judges; in the administration and declaration of the law the merchants, both alien and denizen, had a share. The substantive law, too, was the same in kind and only different in a lesser degree because the commerce of England was also different from that of the Continent in a lesser degree.

Towards the close of the XIV and during the XV Centuries we have watched the expansion of English commerce and the conquest of their own domestic and international trade by the English merchants. Step by step the local business has become national; the national business has become international. But with this development the less developed legal ideas which were suitable for a backward, local commerce were outgrown and the expansion of commerce made the expansion of the apposite legal concepts equally necessary, or, if an immediate expansion or creation was not easy, it became necessary to borrow the requisite principles from the Continent. These ideas were elaborated outside of England, of course, but because of the general similarity of the needs of commerce at a given stage of development they were readily assimilated by the English law of commerce. The law must necessarily always lag somewhat behind the public needs, and this was the rule here.

Commerce had expanded in the XV Century, but we cannot trace the appropriate advance of the law in England until the following century. In the XVI Century the law merchant and the maritime law blossomed under the Tudors in the new Court of Admiralty, which borrowed to a great extent from the already developed legal store of the Continent, and upon this mixed basis of indigenous and borrowed law was built up the modern law in all its most essential particulars.[620]

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[619] Mitchell, p. 7.

[620] *Ib.*, pp. 157–158. "In the 16th century the Law Merchant entered upon a new stage of its development, and its early history may fairly be regarded as closed. All the great principles that mark the commercial law of modern times had then been evolved and successfully asserted, and different forces and influences were becoming important in determining its future history and development . . . By that time every great country in Europe had recognised in

The success and cohesion of this fusing need not surprise us, since, as our studies have shown, the one and the other were essentially cut from the same cloth, even though at different places and in different times, by generations which had taught themselves through many struggles and difficulties the underlying unity of the principles involved, principles which had their bases in the universal requirements of international commerce.

commercial cases the principles of representation, the negotiability of bills of exchange, the liability of the real property of the debtor for his debts, the validity, to a certain extent at least, of formless contracts, the necessity of speedy justice, the importance of the principles of equity and the claims of the bona fide possessor to the protection of the law. The legal relations of partners to one another and to the outside world had, in almost every important point, been definitely settled, and a new commercial contract, insurance, had been evolved and the legal principles that were to govern its development clearly marked. The mediæval merchant had laboured, and the modern world had entered into his labours."

APPENDIX I

MS. DOUCE NO. 227, A. D. 1344

destorement de nef. Ceu qest charge en nef aulops de lestorement de la nef ne deit paier negune codume ne li portages tau malineaus ausi (p. 49).

Qui fretet nef dautre. Si hons fretet nef dautre en Oleron a port vins en autre pais i a nen aura porte xxi tonea por xx si nomeement ne est devise on marche faire (p. 74).

Si diu sunt parsoner par meitie en i vaisseau et li uns lespleitet un tor a son obs domaine li autres parsoners lo espleitera i autre tor. mas si li vaisseaus par tormente ou par deffaute de temps est plus detenuz en i tor qen lautre i ceu ne sera i a comte en la compaignie. Et i ceu meisme est entre plusors parsoners (p. 83).

Si plusors parsoners sunt parsoners en i meisme vaisseau, si luns dans parsoners enmenet lou vaisseau de port ob lassentement de son autre parsoner et au retor lamenet sanz lassentement de son parsoner en autre port que en i quou o il lo ara pres il ne le puet mie metre a esset deciq il lo ayt amene ou port dont il lo aura pris. Ne tandis ausi que li vaisseaus sera en port loigtaig que li parsoners ne le puchet aler voir sanz granz cos ou demores et damages de sey et de la choze si tot encore neys le vesseaus esteit lamenez en port loigdaig ob lou assentement daus parsoners. quar cil que aureit veu lo vesseau freschement poyret engigner en lesset celuy que davant grant piece ne lo aureit veu. et essets se deit fere communaument et leaument (pp. 83–84).

Esser apelon en icest luec quant uns parsoners dit a lautre ge te met lo vesseau a essec en tau manere que tu me deras tant de la meie partie ou ge te deray i taut de la toe. et dit quau some et sachez que li autres parsoners ne puet mie refuder quar autrement ne puet mie estre vaesseas partiz sanz damage et sans la defformation de sa premere matere. E en totes i taus chozes qui ne puent mie estre autrement parties sanz faire essec et cil que lou recet lou deit paier dedenz terme de vii iors apres que lo aura retenu (p. 85).

Si de plusors parsoners li aucuns vent sa partie tau veisseau a autre estrange que ni ait rens affaire li autres parsoners puet retenir lo marche ob touz les convenanz qui i seront sanz si il vont a son obs et autre tau si li uns lo eschanget li autres li puet retenir sil veaut fornir la valor de leschange et ceu meismes est en totes chozes de compaignie quant la choze est par non devis. Non devis apelon quant neguns daus parsoners ne puet dire ne mostrer devisement ou ceste partie en la mea. Et est assaver que parsoners devent partir entreaus leaument et communaument les mises et les prises les bens et les maus segont que affera a chescun par reson de la compaignie (pp. 85–86).

Li marineau acompaignone ou autres genz on vaisseau veent choze desfors que il puchet prendre et metre on vaisseau ne sunt tenu daler ne de prendre la choze ne de metre on vaisseau se il ne volent. Encore neys si tot li sires dau vaisseau ou sis commendemens ou commandet ne sunt il point tenir. Quar li marinea ne sunt tenu fors tau vaissea mareer ne li fuer a que y il sunt establi. mas si avent que de lor volonte il prengent choze il y aront la meite et li sires dau vaissea lautre. Si donques entres convenanz ne aveent entre eaus. Car on dit que convenantz les veint. E est assaver que dau servant que a terre vait au pain et au vin de seignour et assiduoos ou vaisseau la soe partie est au seigneur e que il est ben tenuz en totes maneres de faire lo profet au seignor (p. 86).

Ceu sunt les devers des nefs. Lo assiage et lo planchage et lo qualage paiant les nefs sor lor propre cost lo Rivage paiet li avers segont ceu que il est. E est asaver que cilz doleiron ne paient point. de Rivage de laver que il aportent a ops de lusage de lor ostaus et de ceaus avers les creit hom per lor fey ou par lor saigrement. Mas daus autres avers que il aportent de fors paient lo rivage ausi ben cum li autre estrange sans les vins que hom a de ses propres vignes et les vins daus quarz aus iiii seignors si cùm nos avom dit (p. 112).

Si nez siglent par la mer et li rez seent en la mer et cil de la nef levent ceaus rez et en prengent lou peisson dementres que il trovent les rez sanz guarde et sanz home que lor vendet lo peisson il lou puent prendre se dient li aucun et aucun autre volent dire que cil de la nef font assez se il esparent les rez arrere sanz fere en autre amande et li autre diseent que anceys devreent ceux de la nef lier sauvement aus Rez tant dargent cum vaudreit lo peisson leiaument et ge macort mielz a ceste darrere raison de largent lier au rez quar mis ne deit prendre lautruy travail sanz faire amande (pp. 112–113).

de nez sur encre. Si doues nez sunt sus encre et par tormente lune se desamarret et fert sur lautre et cele qui se desamarret briset lautre cele qui sest desamarree payera la meste dau demage par que ceu est cas daventure si donques cil de la nef qui est ben amarree ne poieant prover per la veue de bones genz ou par autres garens que par deffaute daus marineas ou par deffaute daus appareilz de la dite nef fut desamarree la dite nef et en fust veuz li diz demages et si ceu puet estre prove la nef que est ben amarree nest pas tenue de rendre nus daus damages. mas si li encreant a chaice de cas daventure tant que venget sus la nef que est ben amarree la meste daus demages par ceu que meismes cas li poyet ben avenir. et la nef que est desamarree lautre meite (pp. 117–119).

De partoners de nef. Si duy ou plusor sunt parconer en une nef et li uns daus parconners ne voget ou ne puchet espleiter sa partie i a por ce ne remayndra que cil qui ne veaust ou ne puet espleiter sa partie ne fornissent les couz et les missions daus marineaus et de la nef segont la partie I a seit ceu que il ne espleite sa partie de la nef. Quar por ceu ne coste mie mainz a fornir les marineas ne la nef En autre missions. si cil qui ne veaut espleiter sa partie ne ne puet ne ne veaut fornir les couz si cum nos avom dit li autres qui espleitera sa partie propre de le nef fornira les couz et les missions. Et len ert tenguz li cors de la nef einsi que i a neys encore li autre ne lespleitera decique il len ait paie dreitement de sa partie. Mas or posum einsi luns daus partoners charget sa partie et apres celuy qui ne veost ou ne puet charger sa partie semont que il facet secte ou couz si cum nos avom dit cil en segant ses couz troubet fret a fornist sa partie einsi que mais assez gaigneret en son fret que li autre en sa charge. or vent cilz que ha charge a dit que il veaut aver partie comme compaigz on gaig de celuy que ha frete et si ait sa partie on gaig deceque celuy a gaagne de ceu disons nos que chascun deit aver lo gaig de sa partie cestui de ce que il ha frete. Quar lor compaignie est commune devise. Quant a celuy tor. Quar li uns ha especiaument sa partie cestuy deceque il ha charge et celuy deceque il ha frete. Quar lor compaignie est commune devise quant a celuy tor (pp. 119–121).

Si marineaus deffaut a sa nef garder a la nef ou li avers en recevet domage il est tenguz damander en tout lo damage. Et si est einsi que encore plusors parconers lou ait mis par sey ou marineaus einsi comme uns met autre par sey cis que lo aura mis est tenguz damander en tot lo demage et cil que aureit recegu lou domage lo poyret demander au quau yl vodra daus dous ou au marinea ou a celuy que li aura mis. mas si hom demandet lo demage a celuy que li aura mis lo marinea aura recors a lautre quel y avet mis. mas ne paro si cilz qui auront recegu lo demage hant recegu soceablement celuy marineau que aura este mis nos ne disom mie que cilz que laureit mis en soyt coupable (pp. 122–123).

Si duy ou plusors sunt parconner en une nef chascun daus parsoners poet vendre sa partie se il veaut entreaus au fayre la nef en lemprise de lor compaignie. Quar chascuns hom puet sa partie vendre coma sa choze domayne. Nem paro li aucun vodrient dire que ben deit uns daus parconners aveir la partie de la nef plustost que uns autres estranges por le fuér de autre estrange. mas ceu ne tent mie. Quar avis sereit que fust aliance (pp. 123–124).

Li maistre de la nef deit mener et ramener a sa dreste charge et descharge sur lo ponc de la nef, et apelom petit lomant home qui loget a lentree daus pors et daus avres sevent dau dangers daus porz et daus havres (p. 124).

Si choze de gent de pecey est trovee a la mer ele nest mie a celuy que la trovet mas si il latrait a sauvete aura en merite de celuy a cuy la choze ert par son travail a lesme de prodeshomes. Et issi aura la choze cil cuy ele ert se il la vait requirre dedenz i an et i ior (pp. 132–133).

En gest de nef ne partent rens li cor de la nef ob toz ses appareilz et ob toz son estorement ne li leit ni les huches ni les chozes brevement que sunt establies parventement a lestorage de la nef et de ceaus de dedenz. mas si y a lez huches et taus autres chozes que seient portees par non de marchandie eles partent toutes on gest (p. 133).

La nez non li avers de la nef paier lo quillage et lo grant lomant. Quar desque la nef est bien atornee de marineaus et de grant lomant de se qui en avant si li marchaanz volent aver plus marineaus ou lomanz por lor aver mieuz sauver li marcheant lo deivent aver a lor couz (pp. 133–134).

Li avers que est chargez en oleiron payet lo affiage. Quar par raison de laver vent la nef au port ou ele se fait affier et si tot homs doleiron charget vaisseau et charge lo tout fors tant que si est autres estranges i charget i toneau de vin ou dos ou autre einsi que partie iquele parties que li estranges chargera paiera tout laffiage (p. 134).

Si nez entre desaffiee en port ele paiera xii s. daffiage i a tant petite ne sera (p. 134).

Si nez avalet i a ne facet solement mas que se remuet fors de son siege si na paie son affiage li avers en doblera tau gage et si sen vait fors dau port il ni a autre gage fors doblement de laffiage. Quar cist tau affiage ne sunt for cum mautote et force. mas apprie sunt par lonc usage et tant y a que si hon nest que la nef sen alast et noguist paie son affiage et lo davant dit gage li avers de la nef paieret lo affiage et lo davant dit gage. Ceu est lo dolement de laffiage (pp. 134–135).

La nefz non li avers paie lo planchage. Quar toz vaisseaus deit aveir sa planche a entrer et a essir a charger et a descharger. Ceu est li establimens de la comune de Roan.

APPENDIX II

"FAIRS PAST AND PRESENT," CORNELIUS WALFORD, PP. 250–260

1. *Letter directed to the Mayor of London by the Keepers of the Fairs of Champagne and Brie, dated September, 1299*

To the venerable man, the provident, wise and discreet Warden of London, or to his vicegerent, Peter de Fremeville, knight, and Robert de Champagne, keepers of the fairs of Champagne and Brie for our most illustrious Lord the King of the French, increase of all good with greeting and sincere affection. Whereas heretofore, by our letters patent sealed with the seal of the fairs of Champagne, we have entreated you to compel, or cause to be compelled, the burgess Fauberti, a citizen of Florence and horse-dealer, together with Guido Fauberti, Nutus Fauberti, brothers of the said burgess, Master Gerald de Galaiòn physician, [and] James son of the said Nutus, associates of the said burgess, by the sale of their goods and the seizure of their bodies, sending them back to us, to yield and pay to Pucheus de Pré, formerly horse-dealer, and John de Burgo novo, nephew of the said John deceased and of Martin aforesaid, or to the bearer of our said letters for them, one thousand six hundred petits livres Tournois with sufficient damages and expenses; and to satisfy us concerning the said King's amends for default of the fairs. In which sum of money they are held effectually bounden, and every of them in the whole, for the body of the fairs of Bani [Bari] *super Albam* from the year of Our Lord 1292, as well by reason and because of certain pledges made and committed in and upon the body of the said fairs, as by reason and because of the restitution of more sureties and more costs and damages, which by default of the said burgess and his associates before mentioned in and upon the body of the said fairs they had and were said to have incurred: as in certain open letters of definitive sentence sealed with the seal of the said fairs is said to be contained. Upon which things Tolnetus [elsewhere Nicholas] called Concesse, our sworn servant in the said fairs, by word of mouth related to us that he in the year of Our Lord 1293 presented to you our aforesaid letters (as he says), which deprecatory letters of ours directed to you if forsooth you received, yet you willed not to demand due execution of the same, or to write back any answer to us, although at the end it was duly contained that what you should do therein, you would will and deign by your letters to write back, and although in presence of many trustworthy persons you were so requested by our said servant; on the ground that was begun and raised between the most excellent princes, the King of France and King of England: as our said sworn servant on oath has related all these things to be true, whereat we most greatly marvel, if it is so and we hold ourselves not contemned, since this is to the no mean damage and grievance of the said creditors, and prejudice and contempt of the government of the said fairs committed unto us, because on account of the war aforesaid you were by no means bound to keep back our said letters deprecatory demanding due execution. Wherefore as much as we can with diligence on behalf of our most excellent lord, John by the grace of God, King of France and Navarre, Lord of Champagne and Brie, and on our part, by the tenor of these presents, we move your providence to be entreated, that you do cause all the goods of the aforesaid burgess Fauberti and his associates before named and of the said company to be solemnly proclaimed for sale, and to be sold and divided without delay to the uses and customs of fairs, or so much of them that out of the price of the sale the said creditors (or, for them, the bearer of these presents) as to the aforesaid sum of money with sufficient damages and expenses, and we, as to the amends of our said lord the King, be wholly satisfied; and that the body of the said burgess Fauberti together with the bodies of his associates aforenamed—if they can be found in your jurisdiction, and if the sale of goods does not suffice for the premises—you do send back to us to the fairs in sure and faithful custody to pay among them the charges of the creditors, and to clear themselves before us in this matter as to the uses and customs beforesaid. If, however, you wish to put forward any thing contrary to the report of our said servant, and believe your own interests to be concerned, be present in person before us, or, for yourself, send at a fitting day which the bearer of these presents shall cause to be named to you, to say what shall seem to you expedient. Otherwise, we shall then hold the said report to be fast and firm, you doing thereupon, on account of the reverence and honour due to our aforesaid lord the King and the intervention of our prayers, because we are bounden to you and yours in all manner of favours deserved, such and so much as you would wish us to do for you in the like or a greater case. What you shall do herein, have a care to signify to us by the bearer of these presents in your letters patent together with the present letters demanding execution sent back, notwithstanding that they shall not be presented to you by the servant of the fairs. Given in the year of Our Lord one thousand two hundred and ninety-nine in the month of September.

J. De Sancto Nabore.

2. *Letter sent by the Mayor of London to the Keepers of the Fairs of Champagne and Brie, dated March 19, 1299–1300*

To the noble men and discreet lords Peter de Fremeville knight and Robert de Champagne keepers of the fairs of Champagne and Brie for the lord the King of France, Elias Russel, Mayor, and the Citizens of London, greeting and continual increase of sincere affection. Whereas you lately wrote unto us that we should compel the burgess Fauberti . . . as well by sale of their goods as by seizure of their bodies and also sending them to you, to render to Pucheus de Pré formerly horse-dealer, Martin de Burgo novo and other creditors in your letters comprised, or to the bearer of your said letters 1,600 petit livres Tournois together with damages and expenses, and also the amends of the Lord the King for default of fairs; in which sum of money the aforesaid dealers, and every of them in the whole, are bound by their letters made in the fairs of Bari *super Albam,* by reason of divers contracts between them before had from the year of Our Lord 1292, as in your letters thereupon to us directed more fully is contained: We willing, so far as the laws and customs of England permit, by mutual interchange to comply with your prayers, have caused to come before us, in the presence of John de Flekers your servant and bearer of the presents, the aforesaid burgess and Nutus, dealers, to answer to your said servant concerning the said debt according to the form of your letters, which said dealers asserted that they are quit of all the aforesaid, because of them all they sufficiently satisfied the said creditors, and therein proffered a letter of Gencian de Paris, baker of the King of France, and Robert de Champagne, keepers of the fairs of Champagne and Brie sealed with the seal of the fairs of Champagne, in which it is contained that the said burgess, for himself, his brothers, and associates, in the fairs of Bari *super Albam* in year of Our Lord 1293, appeared in person before the said keepers, and spoke with the said Pucheus and compounded with him under such form that the said Pucheus held himself as paid by the burgess, his brothers and associates abovesaid, by reason of the said composition, as the said Pucheus before the said keepers acknowledged and wholly assented to the said composition for himself and his associates. And because by the letters aforesaid it appeared that the said burgess and his associates by the said composition are totally quit of the debt aforesaid, we could not by your mandate lawfully compel them to pay the said money. Given at London on Saturday next before Mid-Lent in the year of Our Lord 1299.

3. *Second letter of the Keepers of the Fairs of Champagne and Brie for the burgess Fauberti to the Lord Mayor, dated May, 1300*

To the provident men, the venerable and honorable Mayor and Citizens of London, or their vicegerents, or one of them, Peter de Fremeville, knight, and Robert de Champagne, keepers of the fairs of Champagne and Brie, continual increase of sincere greeting with affection. Whereas we, by our letters patent sealed with the seal of the said fairs, have many times prayed and requested you to compel and cause to be compelled the burgess Fouberti, citizen of Florence and horse-dealer, by seizure of his body and goods, and also by the sale of the goods of Guido Fouberti . . . to satisfy Pucheus de Pré . . . on and of the sum (that is to say) of 1060 [for 1600] petits livres Tournois with moderate damages and costs, in which sum of money the said burgess Fouberti together with his associates is held bound to the beforenamed Pucheus, Martin and John, as debtor, concerning the body of the past fairs of Barri *super Albam* in the year of Our Lord 1293, as well by reason and because of certain pledges made and committed in and upon the body of the abovesaid fairs, as by reason and because of the restitution of more sureties and more costs and damages which by default of the said burgess and his associates beforementioned in and upon the body of the said fairs they had and were said to have incurred, as in certain letters of definitive sentence sealed with the seal of the fairs of Champagne is said to be contained: upon which, first, you would make no answer to us, or for our said letters deprecatory demand any execution, as Nicholas called Concesse, our sworn servant, bearer of our said letters (as he said), reported to us on oath by word of mouth; but upon the tenor of our second letters which you caused to be detained with you—as John de Flichers our sworn servant, bearer of the same (as he says) related to us with his own mouth—upon these things with certain closed letters you wrote back, that you caused to come before you in presence of the said John de Flichers the aforesaid burgess and Nutus, dealers, according to the form of our letters to answer to our said servant concerning the said debt, which said dealers asserted they were quit of all the abovesaid, because of all these they duly satisfied the said creditors. . . . By the course of these presents we thus hereupon notify to you that the said sum of money has not yet been in any way satisfied, as Dignus de Pré, son and heir (as it is said) of Pucheus deceased, has given us to understand. And assuredly, moreover, as soon as the said burgess on account of the things aforesaid appeared before you, and alleged the things contained in your answer, you ought to have taken into your hand his goods and those of his said associates, and to have fixed a certain and fit day for him before you, as in our letters abovesaid was contained; for the cognizance of what relates to fairs belongs to no judge, but to us only by reason of the government of fairs committed unto us. Wherefore, on the part of our lord the King of France and on our own part, we again ask your providences to cause without delay so much of the goods of the said burgess and his associates aforesaid to be taken, sold and divided to the uses and customs of fairs that the aforesaid Dignus de Pré may be fully satisfied of the whole sum of money aforesaid with damages and expenses, and we, of the amends; and the body of the said burgess, if the sale shall not suffice for the costs of the said complainant, lest on account of your default *it behove us to inhibit the land and fairs of Champagne and Brie to all your subjects and their goods.* What you shall do herein, have a care to signify to us in your letters patent by the bearer of these presents, sending back the present letters together with our other letters aforesaid detained with you, as has been said. Given in the year of Our Lord 1300 in the month of May.

J. De Sancto Nabore.

4. *Letter from the Lord Mayor of London in answer directed to the Keepers of the Fairs of Champagne and Brie dated August 20, 1300*

To the discreet and honourable men, if it please their most dear friends, the lords Peter de Fremeville, knight, and Robert de Champagne, Wardens of the fairs of Champagne and Brie for the illustrious King of France, Elias Russel, Mayor of London, and the Citizens of the same City, greeting and continual increase of sincere affection with health. Whereas heretofore you wrote to us that we should compel the burgess Fuberti . . . We, as much as in us lies, and as the customs and rights of the Realm of England permit us to do, willing to comply altogether with your prayers and requests, have made to come before us, in the presence of your servant the bearer of the presents, the said burgess and Nutus whom we found in our jurisdiction. Nevertheless we sequestered their goods in the presence of your servant putting upon them concerning the said debt, as is contained in your letters aforesaid. And your letters being heard and understood, the said traders asserted that they are not bound of right to answer to your said letters, because in your letters secondly to us directly (as you assert) it was contained that the said burgess and his associates before you in your fairs in the year of Our Lord 1292 bound themselves, upon which obligation they proffered a certain letter of satisfaction of the said debt, sealed with the seal of the fairs of Champagne and Brie. In which said letter it was contained that the said burgess before you compounded with the said Pucheus, to which composition he the said Pucheus assented; and in these your letters now to us directed it is contained that the said burgess and his associates in the year of Our Lord 1293 bound themselves before you in your fairs: at which writing we marvel. Moreover, at the time in which your said letters were directed unto us, our lord the illustrious King of England was in his war of Scotland with whom at present we have not been able to consult, nor are the said burgess and his associates of the liberty of our City of London: on which account, without the special mandate of our lord the King of England we dared not move a hand toward the seizing of their bodies, or send the said burgess and others out of the Realm of England. Therefore we request and earnestly entreat your lordships that at present in this charge you will hold us excused from the actions abovesaid, and deign to write to our lord the illustrious King of

England upon the aforesaid debts and requests; and those things which shall be commanded us for the advantage of the said creditors, and for your good pleasure, we will dispatch without delay, and to the utmost of our power. Farewell in Him who is the salvation of all men. Given at London on Saturday next after the feast of the Assumption of the Blessed Virgin Mary in the year of Our Lord 1300.

APPENDIX III

FROM MARTIN'S "HISTORY OF LLOYD'S," PP. 46–49

"The earliest English policy of marine insurance which we have been able to discover bears date 1613, and though not a document issued actually by underwriters, but, to all appearance, a copy made for legal purposes, with some lawyer's notes attached, may be found historically interesting. The discovery was . . . the result of long and laborious researches among the, as yet only partly known, literary treasures of the Bodleian Library at Oxford. The original is among the Tanner manuscripts, numbered 74, 60, 32, and the manuscript is endorsed 'Mr. Morris Abbot's pollesye of Assurance dated the 15 of ffebruary 1613. 11. Jacobi.'

" 'In the name of God Amen: Be it knowne vnto all men by these presents That Morris Abbot & Devereux Wogan of London marchants doe make assurance & cause themselves & euerye of them to be assured lost or not lost from London to Zante Petrasse & Saphalonia or any of them vpon woolen & lynnen cloth leade kersies Iron & any other goods & merchandize heretofore laden aboarde the good Shipp called the Tiger of London of the burthen of 200 tonns or thereabouts wherof is master vnder god in this presente voyadge Thomas Crowder, or whosoever ells shall goe for master in the said shipp or by whatsoeuer other name or names the said shipp or the master therof is or shal be named or called. And it shall & may be lawfull for the said shipp to touch & stay at any ports & places on this side Zante as well on the Barbary as the Christian shoare, & ther discharge relade & take in any goods merchandize & mony at the discretion of the master & ffactors vppon the adventure of the Assurers without preiudize to this assurance. And if in case any part of the said goods shalbe discharged out of the said ship at any port or places before mentioned the assurers shall take noe bennefitt or aduantadg therby in case of losse or auradge vppon the rest of the said goods. But the assurers shall still beare their whole adventures if ther be soe much goods remayninge aboarde y^{e} saide shippe as shalbe assured y^{e} assureds aduenture of 10 per C^{o} deducted in as full and ample manner, as if noe parte of y^e^ saide goods had beene discharged out of y^e^ saide shippe before hir cominge to hir last porte of discharge any order custome or vsadge or any thing in this pollacie mentioned to the contrary notwithstandinge. Beginning the Aduenture from the day & howre of the ladinge of the said cloth lead kersies Iron &c. aboard the same shipp at London aforesaid, & soe shall continowe & endure vntill such tyme as the same shipp with the same cloth lead kersies Iron &c. shalbe arrived at Zante Petrasse & Saphalonia or any of them aforesaid and the same ther discharged & laide on land in good safety. Touching the Adventures & perills which wee the assurers hereafter named are contented to beare, & doe faithfully promisse by these presents to take vppon vs in this presente voyadge are of the Seas men of warr, fyer, enemyes pirratts rouers theeues, jettezons, letters of marte, & countermarte arests restraints, & deteynments of kings & princes and all other persons barrtary of the master & mariners, & of all other perills losses & misfortunes whatsoeuer they be or howsoever the same at any tyme before the date hereof hath chaunced or heereafter shall happen or come to the hurte detryment or damadge of the said cloth lead kersies Iron &c. or any parte or parcell therof. Allthough newes or knowledge of any losse haue already come or by the computacion of one league or three English myles to one hower might haue come to London before the subscribinge hereof, any order custome or vsadge heretofore had or made in Lumbard Street or nowe within the Royall Exchange in London to the contrary notwithstandinge. And that in case of any misfortune it shall & may be lawfull to the assureds ther factors servants & assignes or any of them to sue labor & travile for in and aboute the defence safegard & recouerie of the said Cloth Lead Kearsies Iron &c. or any parte or parcell thereof without any preiudice to this assurance. To the charges wherof we the assurers shall contribute each one accordinge to the rate & quantity of his Some herein assured. Yt is to be vnderstood that this protewritinge & assurance beinge made and registred accordinge to the Kings Majesties orders & appoyntments shalbe of as much force strength and effect as the best & most suerest pollacie or writinge of assurance which hath binne euer heretofore vsed to be made lost or not lost in the aforesaid streete or Royall Exchange. And soe wee the assurers are contented & doe promise and binde ourselues euerye of vs our heyres executors & goods by these presents to the assured the executors administrators & assignes for the true performance of the premisses, confessing ourselues fully satisfied contented & paide of & for the consideracion due to vs for this assurance by these presents at the hands of the said Morris Abbott & Devereux Wogan after the rate of fower pounds per C°. And in Testimonye of the trueth wee the Assurers haue hereunto seuerally subscribed our names & somes of moneye assured yeouen in the office of assurance within the Royall Exchange in London the ffyfteenth day of Ffebruary ano. 1613.' "

INDEX

A

ABBEVILLE, 181
ADMIRAL, 3, 60; etymology of the word, 279; title of, 279-280, 299-300; his commission, 263; droits of, 266, 288, 291, 295, 307; originally an executive officer, 267, 279-282, 283, 289-290; judicial power of, 264, 269, 282, 283, 284; his power transferred to courts, 300; usurpation by, 268, 303-308
ADMIRALTY COURTS, 51, 70, 82, 88, 267; rise of, 266, 283-284; development, 81-82, 86-87, 288, 300; appeals from, 293, 300-302, 312; jurisdiction of, 57-58, 87-88, 263, 266, 289-291, 292, 293-295, 303-309, 387; procedure in, 88, 194-195, 291, 295-298, 304; prize jurisdiction, *vide* PRIZE; local, 268-271, 303-309; venue, 278; criminal jurisdiction, 263, 291-294, 300; organization of, 299; a court of record, 302, 314; inefficiency of English, 309-313; spirit of equity, 195-196, 296; of boroughs, *vide* BOROUGHS; of Cinque Ports, *vide* CINQUE PORTS; French language in use in English courts, 298
AGENCY, 4, 73, 191, 202-203
ALEXANDER III, 158
ALEXANDRIA, 5
ALEXIS III, 34
ALFONSO II, 62
ALFONSO III, 115
ALFRED, 264, 328
ALIENS, in England, 291, 297, 327-328, 341, 347, 353-354, 366, 367, 370-388; license required to enter, 328, 329, 370-373; prejudice against, 273, 284, 309, 328, 370-388
AMALFI, 31-34, 42, 45, 49-50; laws of, 43, 46, 50-53, 111
AMIENS, 369
ANCONA, laws of, 46, 54, 110, 112
ANDRONICUS III, 228
ANTWERP, 181, 393, 396
APPEALS, 81, 166, 179, 187, 198-199, 233, 278, 293, 300-302, 312, 366, 377; limited, 61, 154, 193, 337-338; denied, 176
APULIA, 31, 34, 42
ARABS, *vide* MOHAMMEDANS
ARAGON, 61, 62, 63, 77, 81, 87, 181, 390
ARBITRATION, 9, 142-143, 177, 191-192, 300, 368
ARLES, 62, 122, 128
ARMENIA, 181
ARREST, freedom of the market from, 173
ASHBURNER, 13, 35, 36, 38, 39, 51, 52, 59, 86
ATAULPHUS, 29
ATHELSTAN, 328
ATTACHMENT, 339-340
ATTORNEYS AND COUNSELLORS, *vide* LAWYERS
AUBAINE, right of, 167
AVERAGE, *vide* GENERAL AVERAGE
AVIGNON, 153, 219, 222, 242

B

BABYLON, 4
BALDUS, 195, 207
BALEARIC ISLANDS, 29
BANKS AND BANKING, 4, 24, 88, 98, 140, 169, 209, 212, 213, 221, 348, 359-360, 368
BARCELONA, 62, 368, 390; laws of, 53, 77-89, 110, 112, 247, 254, 257, 258; insurance code of, 259-260
BARI, 31
BAR-SUR-AUBE, 157
BARTOLUS, 195, 207, 228, 291
BASIL I, 25, 31, 33, 39
BASIL II, 29, 34
BASILICA, 39-40, 49, 59, 109, 110
BATESON, 346, 353
BAYONNE, 227, 279, 316; laws of, 61
BEARER DOCUMENTS, 4, 216-224
BEAUMONT, 187
BELISARIUS, 25, 29, 30
BENEVENTO, 32
BENSA, 239, 244, 249, 257
BERGAMO, 195
BERGEN, 110, 181, 383
BÉZIERS, 153
BILL OF LADING, 60, 98-99, 214-215

BILLS OF EXCHANGE, in ancient Greece, 4; in ancient Rome, 18-19; in Middle Ages, 60, 89, 168, 169, 171, 203, 209; 218-224; discount, 169; in England, 348, 349, 398-399
BLACK BOOK OF THE ADMIRALTY, 63, 64, 67, 70, 87, 94, 288-292, 296, 297, 307, 311
BLACKSTONE, 335
BOHEMIA, 181
BOLOGNA, 195, 222, 291
BONDS, 305
BOOKKEEPING, 214
BORDEAUX, 369
BOROUGHS, commercial courts of, 268-269, 336-341; maritime courts of, 268-270, 294, 303-309
BOSCO, 247, 249, 250, 256
BOSTON, 332
BOTTOMRY, 5-7, 21, 59, 60, 66-67, 80, 87, 90, 101-102, 107-108, 238, 258
BOULOGNE, 181
BRABANT, 260
BRACTON, 335, 339
BREVIARY OF ALARIC, 21
BRISTOL, 187, 268, 269, 270, 281, 303, 306, 307, 340, 372, 386, 392
BRITTANY, 391
BROKERS, 89, 203-204, 244, 250, 251, 365, 381, 382-383
BRUGES, 74, 89, 153, 156, 181, 248, 250, 395, 396, 398
BULGARIA, 181, 229
BURGRAVES, 175-176
BURGUNDY, 128

C

CALABRIA, 31-34, 42
CALAIS, 156, 181, 377, 395, 396, 398
CANON LAW, 127, 143, 183, 188, 199-200, 207-208, 213
CAPTAIN, *vide* MASTER
CAPUA, 32
CARGO, 48, 90; deck, 60; damage to, 11-12, 36, 37, 87, 100, 264; transshipment of, 14, 37; discharge into lighters, 78; loss of, 270
CARTA MERCATORIA, 354, 364-365, 374, 378, 379
CASTILE, 79, 181, 279
CATALONIA, 83, 250, 286, 368
CHALÆUM, 4
CHAMPAGNE, 42, 155, 156; fairs of, 156-170, 181, 193-194, 209, 211, 218, 219, 242, 349, 360, 407-413
CHANCELLOR, the Lord, 270, 273, 276-277, 308, 311, 347, 377-378, 383
CHANCERY, Court of, 281, 300-302, 306, 307, 310, 312, 313, 376
CHAPMAN, Dr. Conrad, 29
CHARLEMAGNE, 34, 327
CHARTER PARTY, 14, 58, 90, 97-98, 278, 292, 293, 306, 347
CHESTER, 269, 303, 331
CHINA, 9
CICERO, 5, 18-19
CINQUE PORTS, 272, 280; Admiral of, 279-280; jurisdiction of courts of, 269-271, 291, 294, 303, 304, 307
CIVIL LAW, 148, 187-188, 207, 291, 292, 296-298, 314; inferior to maritime customs, 43, 44
CLEIRAC, 63, 117
CLEMENT V, X, 163, 192-193; Decretal *Sæpe contingit*, 193-194, 198
COAST-GUARDS, 91
COINS AND COINAGE, 3-4, 24, 27, 132, 156, 167, 168, 181, 325
COKE, 302, 332, 335
COLCHESTER, 303, 339
COLLISION, 16, 37, 66, 72-73, 91, 117-118
COLOGNE, 187, 328, 362, 363
COLONIAL COURTS, *vide* CONSULS, colonial
COLONNA, 53, 105-107
COMMENDA, 23, 56, 59, 60, 80, 85, 89, 103-105, 120, 210, 238
COMMERCE, 4, 9, 19, 21, 32, 44, 58, 76, 128, 133-134, 136, 139, 156, 157, 172, 184, 262, 284; of England, 263, 265, 324, 325, 330, 346; with Italy, 356-362, 379, 380, 382-386, 387-388, 390; with Hanseatic Towns, 362-366, 388-389; with the Low Countries, 366-368, 391-397; with Spain and Portugal, 368-369, 390-391; with France, 369-370
COMMERCIAL CAUSES, 4, 178, 180, 267, 268, 346-347
COMMERCIAL COURTS, 147, 154, 171, 175, 262, 384; at Barcelona, 88-89; in markets and fairs, 134-137, 171; suppression of technicalities in, 154-155, 160, 177, 183, 216; jurisdiction of, 190-192, 258; procedure of, 192-197; of the English boroughs, 268-269, 336-341
COMMERCIAL LAW, 125, 126, 174, 263, 325; dual origin of, 126-127; codification of, 184
COMMISSION, special, to try cases, 273, 282, 311-312; of the admiral, 263, 299
COMMON LAW, 273, 275, 278, 281, 291, 292, 296-297, 304, 307, 354, 374-375, 376, 384

CONSERVATORS OF TRUCES, 300, 313

CONSOLATO DEL MARE (CONSULATE OF THE SEA), 77-89, 259, 283, 321-322

CONSTANS II, 25, 27

CONSTANTINE V, 35

CONSTANTINOPLE, 22, 28-31, 33-34, 42, 50, 58, 129, 150, 153, 181

CONSULS, 50, 60, 139-143, 160, 197-198; of the sea at Pisa, 54, 56; resident abroad, 58; travelling, 58, 78, 80; colonial, 148-152, 389, 393, 396; in France, 153-155

CONTEMPT, 273

CONTRACTS, 4, 87-88, 162, 206-210, 290, 292-293, 301, 305, 307, 394; of affreightment, 53, 58, 61, 79, 85, 98

CONTRIBUTION, *vide* GENERAL AVERAGE

CORPORATIONS, 211-213, 231; membership, 5, 23, 138-139; bankers, 24

CORPUS IURIS CIVILIS, 5

CORSAIRS, 92

CORSICA, 29

COUNCIL, 273, 276, 282, 304, 305, 308, 310, 311, 314, 347, 376, 377-378, 382

COURT OF PIEPOWDER, 193, 335-340

COURT OF REQUESTS, 314

COURTS, commercial, *vide* COMMERCIAL COURTS; consular, 58, 60-61; maritime, at Pisa, 56-58; at Barcelona, 80-82; of the colonies, 149-152: *vide* MARITIME COURTS

CRETE, 28, 33

CRUSADES, 44, 156

CUSSY, 116, 117, 226

CUSTOM, 3-4, 7, 22-23, 24, 54, 55, 59, 80, 88, 137, 269, 307; the basis of Rhodian Sea Law, 38; and of maritime law of Italian cities, 40-41; governs where Civil Law conflicts, 43, 44; oral at first and later reduced to writing, 44-45, 52, 55-56, 184, 251; borrowing of, 55, 185-187; rarely modified by statute, 68, 183; the basis of commercial law, 182-190, 327; uniformity of, vii-xi, xvi, 184-187

CUSTUMALS, 70-74, 316, 341-342, 402-406

CYPRUS, 27, 32, 33, 58, 59, 110, 213

D

DAGOBERT I, 130

DAMME, laws of, 74, 75

DARTMOUTH, 269, 303

DEBTOR, composition with creditors, 164

DECLARATION OF PARIS, 122, 321

DEMOSTHENES, 6

DEMURRAGE, 66, 68-69, 98, 100

DENMARK, 181, 314, 330

DEODANDS, 118, 120, 291, 295, 387

DESJARDINS, 5, 19, 45, 47, 49, 51, 53, 64, 82, 85, 116

DEVIATION, 92, 98

DIEHL, 30

DOCKAGE, 72

DROITS, of the Admiralty, 61, 266, 288, 291, 295, 307

E

EASTERLINGS, 327, 364

EDGAR, 264

EDWARD THE CONFESSOR, 264, 316, 329

EDWARD I, 71, 202, 227, 229, 272, 273, 290, 316, 349, 359, 364, 368, 369, 392

EDWARD II, 273, 281, 360, 365, 369, 378

EDWARD III, 207, 229, 273, 286-288, 360-361, 366, 369, 370, 379, 392

EDWARD IV, 387, 397

EGYPT, 3, 22, 228

ELIZABETH, 263, 387

ENGLAND, 127, 156, 160, 170, 178, 179, 181, 227, 253, 260

EQUITY, 143, 154, 162, 192, 195-196, 296

ETHELRED II, 328

EXCEPTIONS, 177, 193, 233; renunciation of, 167, 183, 209, 216

F

FACTORS, 191, 202-203

FAIRS, 127, 128, 129, 130-133, 136, 155, 180-181, 193-194, 325-326, 362, 407-413; of England, 328, 329, 330-339; distinguished from markets, 155, 332; decline of, 354-355

FASCICULUS DE SUPERIORITATE MARIS, 285, 288

FLANDERS, 242, 260, 369; fairs of, 180-181, 187, 369

FLETA, 353

FLORENCE, 142-147, 240-242, 243, 251, 252, 256, 360; laws of, 229-230, 247

FLOTSAM, 72, 291, 295, 315

FORMS, *vide* LEGAL FORMS

FORUM JUDICIUM, 21

FRANCE, 21-22, 60-62, 86, 89, 117, 128, 129, 137, 153, 156, 175, 242, 260, 329, 369

FRANKFORT, 177-178, 187

FREDERIC I, 115

FREDERIC II, 152, 227

FREIGHT, 10-11, 14, 87, 97, 109, 198, 236,

264, 278, 301, 306; *pro rata itineris,* 65; when due, 65, 98, 99
FUERO JUZGO, 21

G

GAËTA, 31-32, 42
GAIUS, Institutes of, 21
GASCONY, 280
GENERAL AVERAGE, 5, 13, 14-16, 21, 36, 37, 38, 40, 48, 53, 54, 65, 68, 69, 73, 77, 79, 85, 108-113; contribution, where loss from piracy, 43, 53, 111
GENOA, 62, 63, 139, 140, 153, 212, 213, 220, 221, 228, 237, 243, 249, 250, 252, 254, 280, 281, 360, 390; laws of, 54, 184, 246, 247, 256, 257, 258
GERMANY, 129, 135-137, 153, 156, 171, 175, 181
GHENT, 181
GILDS, 5, 82, 129, 136, 142, 178, 180, 186-188, 192, 197, 198, 211, 362, 386; statutes of, 46, 61, 188-189, 194; Pisan maritime, 57; at Barcelona, 79-81; in Italy, 141-144, 147; in England, 328, 342-346
GIUSTINIANI, 25
GLOUCESTER, 340
GOLDSCHMIDT, 8, 9, 13, 83, 107, 108, 118, 212, 217, 219, 239, 243, 244, 257
GRASSE, 62, 153
GREGORY, Code of, 21
GREGORY OF TOURS, 22
GROTIUS, 121
GUIENNE, 227
GUNDOVALD, 22
GUNTRAM, 22
GUY DE LUSIGNAN, 58

H

HAMBURG, 172, 182, 363
HANSA TOWNS, 330; commerce with England, 362-366, 388-389; privileges in England, 263, 381-382, 386-387
HANSEATIC LEAGUE, 179-180
HANSGRAF, 178-179, 180
HARRISON, 35
HARWICH, 269, 303
HEARING, 295-299; how conducted usually, 298; pleadings, 298; arguments, 298-299
HENRY I, 316
HENRY II, 316, 371
HENRY III, 115, 273, 316, 330, 358-359, 362, 363, 369, 372, 392
HENRY IV, 291, 382, 385, 389, 396
HENRY V, 291, 292, 295
HENRY VI, 289, 292, 295
HENRY VII, 263, 313, 314, 324
HENRY VIII, 263, 314
HEREFORD, 187
HEYD, 94, 148
HOLDSWORTH, Sir William, vii-xiv, xv, xvii, 63, 234, 239-240, 268
HUNGARY, 153, 181, 229
HUVELIN, 330

I

INDIA, 9
INQUISITION OF QUEENBOROUGH, 291, 292, 296
INSURANCE, 5, 7, 18, 19, 38, 89, 158-159, 234-261, 347; subrogation of insurer, 247, 254; insurable interest, 248, 254; reinsurance, 250, 261; *in quovis,* 254, 260; duration of risk, 254; premium, when payable, 256, 259; presumption of knowledge of loss, 258, 260; life, 261; insolvency, 261; market fluctuations, 261; earliest English policy of, 414-416
INTEREST, 166, 200-201, 213, 236, 238-239, 245-246, 258, 361-362; on loans in ancient Greece, 4; mediæval prohibition of, 102, 361
INTERNATIONAL LAW: capture of private property at sea, 62, 79, 122-123, 321-323; contraband, 97; trading with the enemy, 245; recapture of a ship, 114, 283; reprisals, *vide* REPRISALS; prize, *vide* PRIZE; blockade, 319-321; right of neutral to trade by sea with a belligerent, 319-320; visit and search, 321-323; reciprocal provisions in treaties, 367, 368, 386, 387
IPSWICH, 268, 269, 270, 303
ISAAC II, 34
ISAAC COMNENUS, 58
ITALY, 60, 86, 129, 137, 153, 156, 175, 181, 349; 398; relations with Constantinople, 25-35, 40, 42
IUS MERCATORUM, 172

J

JAMES I, 77, 115, 149
JERUSALEM, 181; consuls at, 58, 149; laws of, 46, 54, 58, 59, 110, 154
JETSAM, 114-115, 291, 295, 315
JETTISON, 14-16, 21, 36, 53, 59, 65, 68, 69, 71, 73, 77, 87, 108-111, 264
JEWS, 160, 168, 179, 356
JOHN, 265, 273, 347, 348, 362, 369, 371, 372

JOHN II, 34
JOINT AND SEVERAL LIABILITY, 209-210
JUDGES, 140-141, 142, 197, 383, 387, 397; special for maritime courts, 81-82; special for commercial courts, 129, 136-137, 336, 355; of English admiralty, 299-300, 310, 314
JUDGES DELEGATES, 300-301, 313
JUDGMENTS, 145, 160, 163, 166, 179, 230; execution of, 165, 166, 176
JURISDICTION, 61, 64, 178, 258, 273, 278, 282, 344, 382; of Pisan maritime court, 57-58, at Barcelona, 87-89; of the admiralty in France, 60-61, 284; special, for merchants, 129, 134, 141-150, 374-377; of Hanseatics in England, 179, 364-366, 387; of markets and fairs, 132-137, 178, 355; of commercial courts, 190-192; of the admiralty in England, 263-264, 266-269, 283-284, 289-291; of Piepowder courts, 336-338; of English merchants abroad, 396-397
JURY, trial by, 292, 297-298, 336, 365, 377, 387
JUS GENTIUM, ix, xvi-xvii, 41
JUSTINIAN I, 22-23, 25, 29, 30, 45, 50, 59
JUSTINIAN II, 33

K

KING'S LYNN, 269
KRUMBACHER, 35

L

LAGAN, 291, 295, 315
LAGNY-SUR-MARNE, 157
LAW, canon, *vide* CANON LAW; civil, *vide* CIVIL LAW; common, *vide* COMMON LAW: maritime, *vide* MARITIME LAW; Roman, *vide* ROMAN LAW; commerce requires one system of, vii-ix, xvii, 42, 399-401
LAW MERCHANT, 182, 183, 184, 190, 192, 196, 200, 202, 207, 376, 378, 382; development in England, 325, 327, 342, 345, 354; local courts, 365; its substantive content in England, 346-354, 355
LAW OF NATURE, 375
LAWYERS, 163, 192, 194, 196-197, 298-299, 301, 339, 348
LEGAL FORMS, 208, 298; in Egypt, 3; in Babylon, 4; in ancient Greece, 4; in mediæval France, 221; of insurance, 244, 251, 414-416
LEGNANO, 224, 225, 231
LEO III, 35
LEO IV, 31
LEO VI, 39
LEON, 181
LESINA, 32
LETTER OF CREDIT, 217, 347-348
LETTERS OF DISCOVERY, 314
LETTERS ROGATORY, 337, 407-413
LEX LONGOBARDA, 56
LEX MERCATORIA, vii, 38, 125, 195, 268, 345, 346
LEX RODIA DE JACTU, 5, 14, 108-110
LEX ROMANA BURGUNDIONUM, 20-21
LEX VISIGOTHORUM, 20
LIBELL OF ENGLISHE POLICYE, THE, 368, 384
LIGHTERS, 78, 97, 100
LIGHTHOUSES, 91
LILLE, 181
LIMITATION OF ACTIONS, 224
LIMITATION OF LIABILITY, 91, 118-122
LITTLE RED BOOK OF BRISTOL, 70, 268, 354
LITTLETON, 374
LIUTPRAND, 20, 31, 33
LOANS, 3; *vide* MARITIME LOANS
LOMBARDS, 20, 30, 32, 140, 160, 386
LONDON, 70, 187, 269, 303, 306, 328, 352, 363, 364, 370, 372-374, 378, 383, 385-386
LOSTWITHIEL, 269, 270, 299
LOUIS IX, 60, 116, 158
LOUIS XI, 117, 123
LÜBECK, 179, 187, 362, 363, 366; laws of, 76-77, 110
LUCCA, 165
LYONS, 156, 157; fairs of, 170-171

M

MAGDEBURG, 187
MAGNA CARTA, 371-374
MAINTENANCE AND CURE, disabled seamen's right to, 65, 96
MAITLAND, 352, 372
MAJORCA, 181
MALYNES, vii, 38, 125
MANIAKÈS, GEORGE, 29
MANSOURAH, 32
MANUEL I, 34
MARINER, *vide* SEAMEN
MARITIME CONTRACTS, within jurisdiction of early maritime courts, 53, 58, 81, 82, 85, 87-88, 98, 100; and of English admiralty, 290, 292-293, 301, 305, 307
MARITIME COURTS, early, 6, 46, 51, 52, 56-58, 70-71, 81-82, 86-88, 194-196, 258; *vide* ADMIRALTY COURTS

MARITIME LAW, 46, 263, 283-284, 288; of Rome, 8-19, 43, 60; customary origin of, 36, 38, 40-41, 80; continuity of, 19-20, 22, 25-27, 35, 40, 269-272, 309, 325-327, 399-401; of England, 70, 296, 297-298, 304, 341; uniformity of, viii-xi, xv-xvii, 19-20, 51-52, 125-126, 400-401

MARITIME LOANS, in ancient Greece, 4, 7; in ancient Rome, 17-18, 23; later Roman Empire, 36; mediæval Italy, 56; in middle ages, 101-103, 104, 219-220, 235-236, 239-240

MARKETS, 127, 130-133, 136, 155, 172-174, 268; distinguished from fairs, 155, 332; in England, 326, 329-339

MARSDEN, 120, 121

MARSEILLES, 22, 128, 153, 154, 196, 221, 325; laws of, 53, 59, 152

MASTER, 10-12, 36, 53, 65, 73, 78, 79, 85, 87, 91, 270

MAURICE I, 22

MELORIA, 54

MERCANZIA, 143-147, 230, 258

MERCHANT ADVENTURERS, 391, 392, 393, 396; privileges abroad, 393, 396-397

MERCHANTS, 154, 162, 172, 178, 329; alien, in ancient Greece, 4; alien, in Italy, 56; alien, in Florence, 143-147; in England, 265, 267-268, 270, 272-273, 286-287, 297, 304, 308, 347, 354, 356, 370-388, 391-392; influence on early maritime courts, 82; legal definition of, 126, 182, 345; protection of alien, 131, 136, 158-159, 170; subject to jurisdiction of commercial courts, 134, 144-147, 190-192; desire for speedy justice, 176; lawmaking by, 182-190, 336; English prejudice against alien, 273, 284, 309, 328, 370-388

MICHAEL IV, 29

MICHAEL VIII, 29, 30

MILAN, 186

MITCHELL, 137, 184, 201, 330

MOHÁCS, 25

MOHAMMEDANS, 25, 27-29, 31, 33, 43, 54, 116, 156

MONTEPULCIANO, 45

MONTPELLIER, 153, 154, 156, 222, 369; laws of, 60; consular court, 61

MOREL, 8, 9, 141, 152, 178

MOROCCO, 181

N

NAME OF SHIP, 13, 94

NAPLES, 31-34, 42, 153

NARBONNE, 153, 228, 369

NARSES, 25

NAVARRE, 181

NAVIGATION, dangers and difficulties of, 13, 91-93

NEGOTIABLE INSTRUMENTS, 215-224, 347

NETHERLANDS, 181

NEWCASTLE, 269, 303

NICE, 62, 63, 242

NICEPHORUS I, 33

NICEPHORUS II PHOCAS, 28, 32-34, 45

NIJNI NOVGOROD, 181

NÎMES, 153, 156

NORMANS, 34, 35, 42, 43, 45, 156, 227, 286

NORWAY, 181, 316, 330, 389

NOTARIES PUBLIC, 90, 208, 209, 221, 223, 244, 250, 251, 314, 350

NUREMBURG, 177

NYS, 227

O

ŒANTHIA, 4

OFFA, 327

OLAF KYRRE, 330

OLÉRON, 115; laws of, 37, 49, 63-76, 110, 112, 116, 265, 269, 270, 291, 307, 402-406; origin of, 63-64, 74-76

ORDER DOCUMENTS, 168-169, 216-224; in ancient Greece, 4; in England, 349

ORDONNANCE DE LA MARINE OF 1681, 122-123

OSTIA, 31

OSTROGOTHS, 29, 30

OTHO I, 45, 138

OTTO II, 33

OWNERS, 10-12, 77, 236; joint ownership, 12, 53, 73, 85, 87, 90; suits between, 74, 95, 301; disagreements between part owners, 73-74, 95; liability for torts of master and crew, 12, 91, 118-119; liability for contracts of master, 12, 118-119; part, may be compelled to give security to other part, 73-74

OXFORD, 187

P

PADSTOW, 269, 270, 304

PALERMO, 28

PARDESSUS, 19, 21, 63, 64, 75, 86, 117, 226

PARIS, 153, 156

PARTITION, of ships, 73-74, 95

PARTNERSHIP, 80, 105, 210-213

PART OWNERS, *vide* OWNERS

PASSENGERS, 79, 85, 93; contracts for

transportation of, 13; torts against, 11; baggage of, 11

PAUL, Sentences of, 21

PEDRO II, 63

PEDRO III, 30, 81

PERPIGNAN, 61

PHILIP AUGUSTUS, 228

PHILIPPE LE BEL, 158, 227

PHŒNICA, 3

PIACENZA, 348

PIEPOWDER, courts of, 193, 335-340

PILOTAGE, 66, 67, 70, 72, 77

PIRACY, in ancient Greece, 4; in Roman Empire, 9, 11, 13, 15; in middle ages, 38-39, 57, 60, 61, 72, 79-80, 85, 89, 92, 93, 263, 266, 272, 273, 281, 284, 288, 297, 300, 304, 310, 311, 312, 313, 314, 360; contribution, 38, 43, 49; recapture, 282, 311

PISA, 32, 34, 35, 62, 63, 139, 141, 143, 227, 228, 229, 242, 252; laws of, 46-47, 53, 54, 59-60, 89, 110, 112, 152, 187; maritime court of, 56-58, 86-87; consuls of the sea at, 56; travelling consuls, 58

PLEADINGS, 298; not technical, 296

POLAND, 181

PORTUGAL, 153, 181, 282, 368, 390

POWER OF ATTORNEY, 203

PRACTICE, in admiralty, 291, 295-298, 304

PRIZE, 61, 77, 79, 80, 122, 283, 291, 295, 300, 308, 310, 311, 321-323

PROCEDURE, 4, 259, 291; summary, 61, 81, 82, 88, 129, 143, 145, 154, 162-163, 171, 175-177, 180, 192-194, 258, 270, 326, 335, 338, 341, 366, 376; simplification of, 154-155, 177, 195-196, 338-339; entries in commercial books evidence of debt, 214; of Italian consular courts, 148-150; of the English admiralty courts, 291, 295-298, 304; of English market and fair courts, 326-327

PROCTORS, *vide* LAWYERS

PROVENCE, 62-63, 160, 326

PROVINS, 157, 167

Q

QUEENBOROUGH, Inquisition of, 291, 292, 296

QUO WARRANTO, 333

R

RAGUSA, 53, 112

RANSOM, 15

RAVENNA, 29, 30, 34

REGENSBURG, 178

REPRISALS, 57, 89, 92, 144-146, 164, 224-234, 266, 272, 284, 312, 314, 317-319, 335, 352-354, 365; letters of marque, 317-318

RHODES, 5, 6, 8, 27, 229

RHODIAN LAW, 5-6

RHODIAN SEA LAW, 35-38, 40, 49, 59

RICHARD I, 58, 63, 316, 356, 362, 392

RICHARD II, 294, 381-382; statutes of, 294, 297, 305-306

RICHARD III, 387

ROCHESTER, 269, 308

ROMAN LAW, viii-x, 8-19, 20-21, 24, 30, 38, 43, 46, 55, 56, 59-60, 77, 79, 108-112, 113, 114, 117, 118, 127, 130, 175, 176, 183, 199-200, 207, 208, 298

ROMANUS II, 32

ROME, 7-19, 31, 219

ROUEN, 187

RUSSIA, 181

S

SAILORS, *vide* SEAMEN

ST. IVES, 332, 349, 354, 360

ST. JEROME, 21

SALE, 3, 204-206, 239, 247, 248, 351; purchase of goods in market overt, 204-206, 329, 351-352; by sample, 351

SALERNO, 32

SALVAGE, 16, 113-114, 283; cases of within the admiralty jurisdiction, 283; who may claim, 113-114; for what services a claim may be made, 37, 38; life, 15

SARACENS, *vide* MOHAMMEDANS

SARDINIA, 29, 32, 181

SAXONY, 328

SCARBOROUGH, 269

SCIRE FACIAS, 334

SEAL, 336; of fairs of Champagne, 161-164, 209; of the Staple, 394

SEAMEN, 10-12, 36, 48, 49, 66, 90; liability for torts of, 11-12, 36, 270; discharge of, 48, 66, 96; wages of, 48, 53, 61, 65, 66, 69, 72, 87, 92, 96, 198, 291; barratry of, 53; insurance against barratry, 255; cure of, 65, 96; torts of, 65-66, 73-74, 91; duties of, 48, 65-66, 72-73, 77, 78, 79, 85, 96; negligence of, 264; jurisdiction over, in England, 338, 341

SHIPOWNERS, *vide* OWNERS

SHIPS AND VESSELS, 3, 7, 9, 12, 21, 36-37, 85, 93; name of, 13, 94; size of, and capacity, 7, 13, 61, 94, 99, 265;

injuries to, as giving right to contribution, 15-16, 36-37, 93, 97; limitation of liability of owners of, 91, 118-122; repairs, 10, 15, 37, 48; consort and convoy of, 53, 59, 62, 85, 93, 272; sale of, 85, 87; seaworthiness of, 94, 98, 120
SICILY, 25, 28, 29, 31, 32, 42, 243
SOUTHAMPTON, 270, 307, 385-386
SOVEREIGNTY OF THE SEAS, 264, 287
SPAIN, 29, 60, 62-63, 77, 153, 187, 195, 250, 279, 367-368
SPALATO, 54, 112
SPOIL, 266, 272, 273, 281, 282, 284, 311, 314, 315, 360
STAMFORD, 332
STAPLE, Statute of the, 229, 267, 376-377, 380, 394-395; courts of, 347, 355, 376-378; Merchants of the, 384, 391, 393-397
STATUTE, of Winchester, 334; of Westminster, 316, 335, 354; 13 Rich. II, chap. 5, 297, 305; 15 Rich. II chap. 3, 294, 297, 305-306; 2 Hen. IV, chap. 11, 297, 301, 302, 306; of Truces, 300, 310, 318
STOURBRIDGE, 332
STOWAGE, 72, 85, 97
STRACCHA, 43, 188, 195, 239, 252
SWEDEN, 389
SYRIANS, 21-22, 128

T

TAGINÆ, 29
TARTARY, 181
TAXES, 23, 45, 131
THEODORIC II, 29
THEODOSIAN CODE, 21
THESSALONICA, 28, 34
THOUROUT, 181
TORTOSA, 84
TOWAGE, 66, 78
TRADEMARKS, 213
TRANI, 31, 46
TRANI, Ordinamenta of, 43, 45-49, 63
TRIAL, *vide* HEARING *and* PROCEDURE
TROYES, 157, 166, 167
TUNIS, 181
TWISS, Sir Travers, 20, 43, 46, 51, 52, 63, 64, 67, 68, 75, 76, 77, 83, 288, 290
TYNEMOUTH, 269, 308

U

UNDERWRITERS, may claim, 247, 254
UNITED STATES, Admiralty jurisdiction, 58, 189; procedure in Admiralty courts, 340

V

VALENCIA, 86, 89; laws of, 77, 81-82, 110, 112
VENICE, 31-34, 58, 228, 229, 360, 382, 385; laws of, 46, 53, 112, 247, 258
VENUE, 178, 278
VESSELS, *vide* SHIPS AND VESSELS
VISIGOTHS, 21, 29, 115

W

WAGES, *vide* SEAMEN
WAGNER, 35
WALLIA, 29
WAREHOUSES, 123; receipts, 123-124, 214-215
WEIGHTS AND MEASURES, 167-168, 291; in Babylon, 4; in England, 335, 351, 365
WEYMOUTH, 314
WILLIAM THE CONQUEROR, 264, 329
WINCHESTER, 331, 332, 386
WISBY, 181, 362; laws of, 63, 76
WOOL TRADE, 140, 357-360, 367-368, 379, 380, 385, 391-397
WRECKS, 11, 13, 15, 16, 48, 65, 77, 79, 80, 93, 106, 113-114, 228, 266, 282, 291, 295, 304, 311, 387, 395; claimed by the admiral, 316; feudal right of shipwreck, 68, 114-117, 264, 315-317, 362

Y

YARMOUTH, 268, 269, 303, 308
YPRES, 181, 228

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